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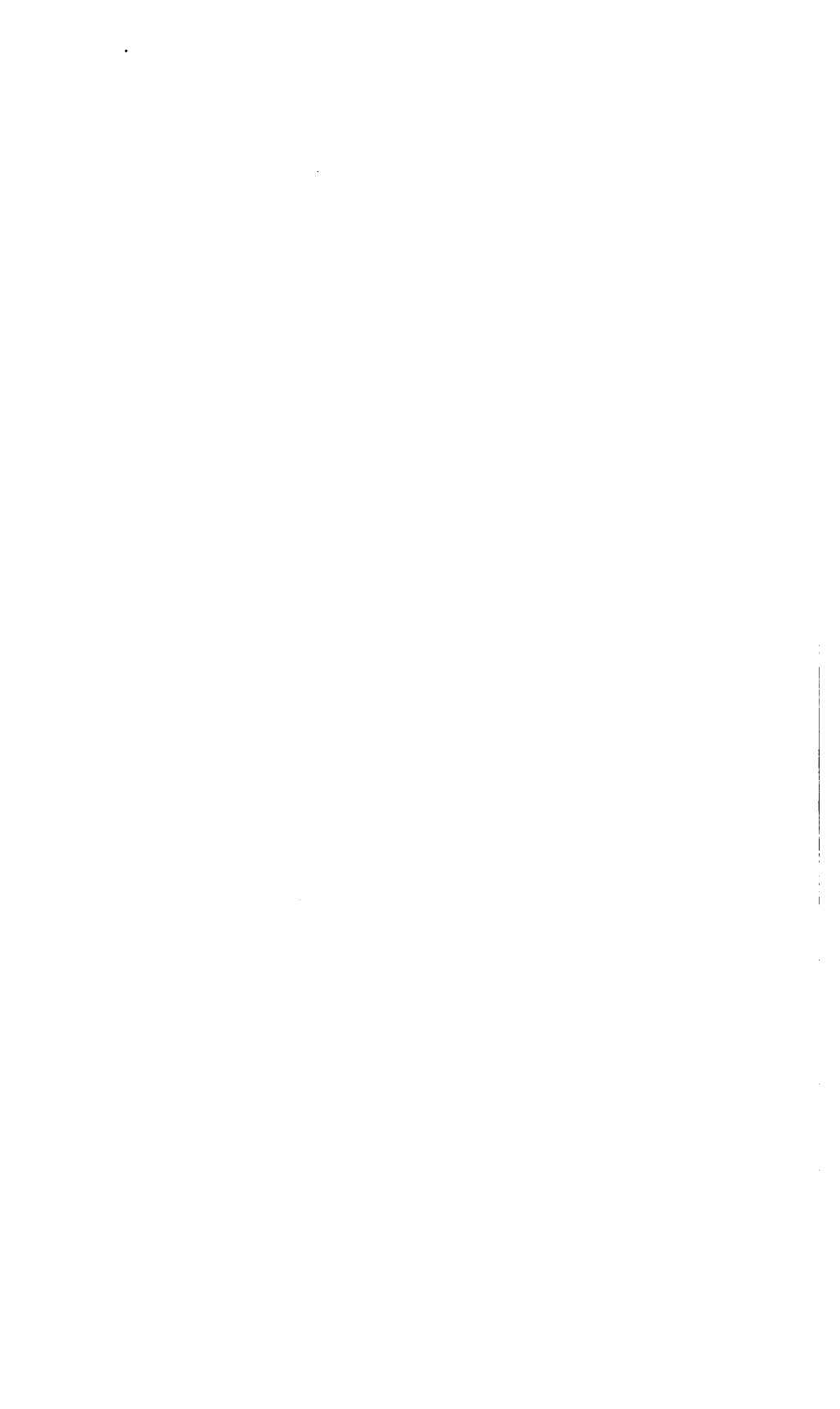














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**A TREATISE**

**ON THE LAW OF**

**PERSONAL PROPERTY.**

**BY**

**JOSEPH J. DARLINGTON, LL.D.,**

**OF GEORGETOWN UNIVERSITY, COLLEGE OF LAW.**

**FOUNDED ON THE TREATISE OF JOSHUA WILLIAMS, Esq.**

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## PREFACE.

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THAT Mr. Williams's treatise upon the law of Personal Property did not attain, in America, equal eminence with that author's invaluable work upon the law of Real Property was due solely to the fact that so large a proportion of the former was devoted to summarizing modern English statutory provisions, and the decisions under them, of little, if any, value or interest here. So much of that work as was devoted to the statement of principles, and to the consideration of adjudicated questions of general application, remains unequalled in its concise comprehensiveness, clearness and accuracy.

The object of the present edition has been two-fold, namely: To eliminate entirely from the original work so much of its text as is inapplicable in the United States, and to supply, instead, a further presentation, upon the latest authorities, English and American, of the law of the subjects treated of in the retained text, together with that of sundry topics of importance not therein discussed. The few notes which have been retained are, as indicated by the initials "G. & W.," the work of the learned editors of the last edition of Williams on Personal Property, Messrs. Gerhard and Wetherill, of the Philadelphia bar.

The title of the present volume is a compromise. The writer, of course, could not consent to claim as his own any part of the work of another, while neither the publishers nor the writer have been willing to offer to the profession, under the sanction of Mr. Williams's name, a book the greater part of which lacks the advantage of his eminent abilities. The present title has, therefore, been agreed upon, to be accompanied by this explanation:

Every paragraph of the following pages, with inconsiderable exceptions, the references in which are exclusively to English authorities, is the unchanged text of Mr. Williams. All paragraphs containing both English and American citations, or the latter only, are wholly new.

The chapter upon Ships is the work of Martin F. Morris, LL.D., Professor of Admiralty in the Law School of the Georgetown University; while that upon Patents, Trade-Marks and Copyright, has been prepared by Robert G. Dyrenforth, LL.D., late Acting Commissioner of Patents.

Acknowledgment is also due, and is most cordially extended, to Messrs. William H. Sholes and J. Altheus Johnson, of the Washington Bar, for invaluable aid in the verification of citations, and the preparation of the index and tables of cases.

JOSEPH J. DARLINGTON.

WASHINGTON, D. C., July 21st, 1891.

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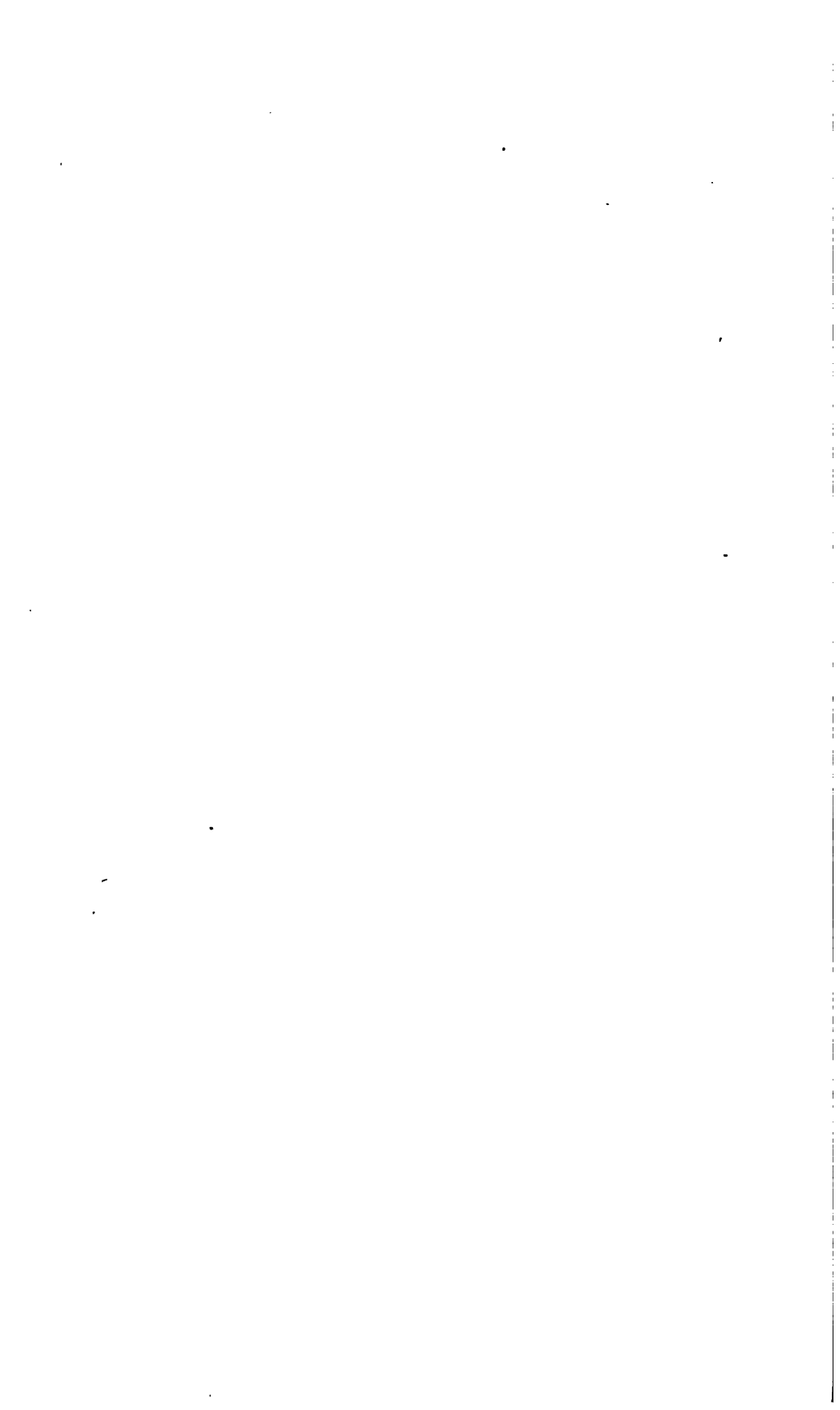
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# PRINCIPLES

## OF THE

### LAW OF PERSONAL PROPERTY.

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#### INTRODUCTORY CHAPTER.

##### OF THE SUBJECTS AND NATURE OF PERSONAL PROPERTY.

THE English law of property is divided into two great branches—the law of real property, and the law of personal property. The feudal rules, which respected the holding and culture of land, were the elements of the common law of real property; the rules relating to the disposition of goods were the origin of the law of personal property. Such property was anciently of little importance, and its laws were consequently few and simple. It did not, however, escape the ecclesiastical influence which spread so widely in the middle ages; and it has thence derived that subjection to the rules of the civil law by which it is characterized when transmitted by will or distributed on intestacy.

The division of property into real and personal, though now well recognized, and constantly referred to even in the acts of the legislature, is comparatively of modern date. In ancient times property was divided into *lands, tenements and hereditaments* on the one hand, and *goods and chattels* on the other.

Though sometimes said to be synonymous, these terms, *goods* and *chattels*, differ materially in comprehensiveness. The latter term embraces every species of property, movable or immovable, which is

less than a freehold.<sup>1</sup> *Goods*, on the other hand, will not include either animals or chattels real,<sup>2</sup> nor fixtures,<sup>3</sup> nor, according to the settled weight of English authority, shares of stocks, promissory notes, or other evidences of value not possessing intrinsic worth.<sup>4</sup> In Massachusetts, the term has been held sufficient to comprehend both shares of stock and promissory notes.<sup>5</sup> Patent rights, it seems, are not comprehended under the term "goods;"<sup>6</sup> and whether growing crops are comprehended by it is questioned.<sup>7</sup>

The foregoing decisions, for the most part, arose under the seventeenth section of the Statute of Frauds, making void verbal sales of "goods, wares and merchandise" for the price of ten pounds sterling or upwards, without at least partial payment, partial delivery and acceptance, or earnest.

In wills, where there is nothing to restrain its meaning, the term *goods* will include all the testator's personal estate.<sup>8</sup> And in *U. S. v. Moulton*,<sup>9</sup> it is said that, while under penal statutes *goods* are limited to movables possessing intrinsic value, in a more large and liberal sense the term may embrace movables not possessing intrinsic value, such as choses in action, moneyed securities, notes, bonds, and other debts, and evidences of debt.

In process of time certain estates and interests in land grew up which were unknown to the ancient feudal system, and which could not conveniently be subjected to its rules. Of these the most important were leases for years. Such interests, therefore, were classed among chattels; but as they savored, as it was said, of the realty,

<sup>1</sup> 2 Kent Com., 342; 2 Bl. Com., 385; *People v. Holbrook*, 13 Johns. R., 90; *State v. Haight*, 6 Vroom, 279, 282.

<sup>2</sup> Co. Litt., 118; *R. R. v. Thompson*, 19 Ill., 584.

<sup>3</sup> *Mayfield v. Wadsley*, 3 B. & C. (10 E. C. L.), 357; Bouv. L. Dict., "Title Goods."

<sup>4</sup> *Humble v. Mitchell*, 11 A. & E., (39 E. C. L.), 205; *Haseltine v. Siggers*, 1 Exch., 856; *Tempest v. Kilner*, 3 C. B. (54 E. C. L.), 249; *Bowly v. Bell*, *Id.*, 284; *Duncuft v. Albrecht*, 12 Simon., 189; *Watson v. Spratly*, 10 Exch., 222; *Powell v. Jessop*, 18 C. B. (86 E. C. L.), 336.

<sup>5</sup> *Tisdale v. Harris*, 20 Pick., 13; *Baldwin v. Williams*, 3 Met., 365. See also to similar effect, *North v. Forest*, 15 Conn., 400; *Fay v. Wheeler*, 44 Vt., 292; *Colvin v. Williams*, 3 H. & J., 38; *Riggs v. Magruder*, 2 Cranch, C. C. R., 143.

<sup>6</sup> *Somerby v. Buntin*, 118 Mass., 285.

<sup>7</sup> *Blackb. on Sales*, 17, 1920; *Evans v. Roberts*, 5 B. & C., 836; *Taylor on Evidence*, 953; *Benj. on Sales*, 4th Am. ed., 121.

<sup>8</sup> *Keyser v. School District*, 35 N. H., 483.

<sup>9</sup> 5 Mason, 544.

they acquired the name of *chattels real*.<sup>1</sup> In more modern times, chattels real have been classed, with other chattels, within the division of personal property; but as chattels real, though personal property, are in fact interests in land, the laws respecting them have been noticed in Williams' treatise on the Principles of the Law of Real Property.<sup>2</sup> Chattels real will therefore be only incidentally noticed among the subjects treated of in the present work.

When leases for years, and other interests in land of a like nature, were admitted into the class of chattels as chattels real, it became necessary that such goods as had previously constituted the whole class should be distinguished from them by some further name; and the title of *chattels personal* was accordingly applied to all such chattels as did not savor of real estate. For this title, the choice of two reasons is given to the reader by Sir Edward Coke, "because, for the most part, they belong to the person of a man, or else for that they are to be recovered by personal actions."<sup>3</sup> The former of these two reasons has been chosen by Mr. Justice Blackstone.<sup>4</sup> But it is submitted that the latter reason is most probably the true one. When goods and chattels began to be called personal, they had become too numerous and important to accompany the persons of their owners. On the other hand, the bringing and defending of actions has always been the most prevailing business of lawyers; from the different natures of actions, the nomenclature of the law is, therefore, most likely to have proceeded. Now actions were long divided into three classes—real actions, personal actions, and mixed actions. Real actions were brought for the recovery of

<sup>1</sup> Co. Litt., 118 b.

<sup>2</sup> Principles of the Law of Real Property, 315 *et seq.*, 1st ed.; 307, 2d ed.; 322, 4th ed.; 333, 5th ed.; 350, 6th ed.; 356, 7th ed.; 6th Am. ed., 289–290, 306 *et seq.*

<sup>3</sup> Co. Litt., 118 b.

However unimportant any discussion may be as to the origin of the term personal, as ascribed to chattels, it is conceived that the reason of the designation as given by Blackstone is the correct one. All chattels formerly known to the law were by their nature movable, and a very large class of them, such as debts, obligations and the like, had no tangible existence, and were supposed by the law "to attend the person," and are subject to the incidental laws of the domicile of the owner, in the case of intestacy and insolvency; while real estate, being immovable, is governed only by the law of the place where it is situated, independently of the actual domicile of the owner. This would seem to be a more probable reason than the mere fact of their being the subject of actions called personal.—W. & G.

<sup>4</sup> 2 Black. Com., 16, 384; 3 Black. Com., 144.

lands, and, by their aid, the *real land* was restored to its rightful owner. Mixed actions, as their name imports, were real and personal mixed together. Personal actions were brought in respect of goods for which, as they are in their nature destructible, nothing but pecuniary *damages* could with certainty be recovered from the *person* against whom the action was brought. Accordingly, by the ancient law of England, there never were more than two kinds of personal actions in which there was a possibility of recovering, by the judgment of the Court, the identical goods in respect of which the action was brought. One of these was the action of *detinue*, where goods, having come into a man's possession, were unlawfully detained by him; in which case, however, the judgment was merely conditional, that the plaintiff recover the said goods, or (*if they could not be had*) their respective values, and also the damages for detaining them.<sup>1</sup> The other was the action of *replevin*, brought for goods which had been unlawfully distrained; but in this case the goods were never beyond the custody of the sheriff, who is an officer of the law, and their safe return could therefore be secured.<sup>2</sup>

Though certainly confined for many years in England to the recovery of goods distrained,<sup>3</sup> the action of replevin is said to have extended originally to all cases of the wrongful taking or detention of chattels.<sup>4</sup>

In some few of the States of our Union, the action seems still confined to cases of distress for rent; but in nearly all of them it has been restored to its supposed original scope of affording a remedy for all cases of the wrongful taking or detention of chattels the possession of which the plaintiff has a right to demand. Even a wrongful taking is held, in many of the States, not to be essential. "Although the form of the declaration has not been changed, the allegation of a wrongful taking is a mere fiction, generally false in point of fact, and evidence of nothing in support of the plaintiff's claim."<sup>5</sup>

<sup>1</sup> 3 Black. Com., 152.

<sup>2</sup> *Ibid.*, 146.

<sup>3</sup> 3 Bl. Com., 146.

<sup>4</sup> See *Pangburn v. Partridge*, 7 Johns., 140; *Shannon v. Shannon*, 1 Sch. & Lef., 327; *Herdic v. Young*, 55 Pa. St., 177; *Reist v. Heilbrenner*, 11 S. & R., 132.

<sup>5</sup> *Cullum v. Bevans*, 6 H. & J., 470; *Badger v. Phinney*, 15 Mass., 359; *Baker v. Fales*, 16 Mass., 147; *Marston v. Baldwin*, 17 Mass., 606; *Whitmar v. Merrill*, 125 Mass., 127; *Clark v. Adair*, 3 Harr. (Del.), 113; *Brooke v. Berry*, 1 Gill,

But where the taking was lawful, as, also, where the plaintiff's title or right to possession has been acquired subsequent thereto, there must, in general, be a demand and a refusal to deliver, before action brought, or, at least, before the writ is served.<sup>1</sup>

And so where, though wrongfully taken, the defendant came by them innocently, it is held, in some of the States, that a demand must be made before suit brought.<sup>2</sup> In some of the States, it is held that the action is restricted to cases in which there was a tortious taking.<sup>3</sup> Replevin is a possessory action, in which the right to present possession is the controlling question to be tried.<sup>4</sup> Therefore one taking forcible possession of his own goods, though he may be liable in trespass, is not liable in replevin.<sup>5</sup>

The plaintiff must in all cases have a general or special property in the goods claimed, with the right to their immediate possession, at the commencement of the suit.<sup>6</sup> Therefore, right of possession

163; *Seaver v. Dingley*, 4 Greenl., 306; *Sprague v. Clark*, 41 Vt., 6; *Stone v. Wilson*, *Wright* (Ohio), 159.

<sup>1</sup> *Gates v. Gates*, 15 Mass., 310; *Badger v. Phinney*, 15 Mass., 359; *Newman v. Jenne*, 47 Me., 520; *Hazzard v. Burton*, 4 Harr. (Del.), 62; *Gilchrist v. Moore*, 7 Clarke (Iowa), 9.

<sup>2</sup> *Stanchfield v. Palmer*, 4 Greene (Iowa), 24; *Wood v. Cohen*, 6 Ind., 455; *Ingalls v. Bulkley*, 13 Ill., 315; but see *Lewis v. Masters*, 8 Blackf., 245; *Riley v. Boston Water Power Co.*, 11 Cush., 11; *Courtis v. Cane*, 32 Vt., 232; *Harding v. Coburn*, 12 Met., 342; *Hoare v. Parker*, 2 T. R., 376; *Hudson v. Maze*, 3 Scam., 582; *Kelsey v. Griswold*, 6 Barb., 440; *Hall v. Robinson*, 2 Comst., 295.

<sup>3</sup> *Marshall v. Davis*, 1 Wend., 109; *Harwood v. Smethurst*, 5 Dutch, 195; *Ely v. Ehle*, 3 Comst., 506; *Dame v. Dame*, 43 N. H., 37; *Wright v. Armstrong*, *Breese* (Ill.), 172; *Pirami v. Barden*, 5 Ark., 84; *Wallace v. Brown*, 17 Ark., 452; *Neff v. Thompson*, 8 Barb., 215; *Woodward v. Railway Co.*, 46 N. H., 525; *Smith v. Huntington*, 3 N. H., 76; *Wheelock v. Cozzen*, 6 How. (Miss.), 280; *Miller v. Sleeper*, 4 Cush., 370; *Ramsdell v. Buswell*, 54 Me., 548; *Chinn v. Russell*, 2 Blackf., 176, note 3; *Vaiden v. Bell*, 3 Randolph, 448; *Drummond v. Hopper*, 4 Harr., (Del.), 327.

<sup>4</sup> *Heeron v. Beckwith*, 1 Wis., 27; *Childs v. Childs*, 13 Wis., 18; *Rose v. Cash*, 53 Ind., 278; *Hunt v. Chambers*, 1 Zab., 624; *McCoy v. Cable*, 4 Clarke (Iowa), 557; *Corbitt v. Heisey*, 15 Iowa, 296; *Johnson v. Caruley*, 6 Seld., 570, 573; *Seldner v. Smith*, 40 Md., 603; *Smith v. Williamson*, 1 H. & J., 147; *Hickey v. Hinsdall*, 12 Mich., 100; *Jackson v. Sparks*, 36 Ga., 445.

<sup>5</sup> *Taylor v. Welbey*, 36 Wis., 42; *Hurd v. West*, 7 Cow., 753; *Spencer v. McGowan*, 13 Wend., 256; *Coverlee v. Warner*, 19 Ohio, 29; *Marsh v. White*, 3 Barb., 518; *Owen v. Boyle*, 22 Maine, 67; *Carroll v. Pathkiller*, 3 Porter (Ala.), 279; *Neely v. Lyon*, 10 Yerg., 473; *Bogard v. Jones*, 9 Humph., 739; *Collomb v. Taylor*, *Id.*, 689.

<sup>6</sup> *Gordon v. Harper*, 7 T. R., 9; *Smith v. Plomer*, 15 East, 607; *Muggridge*



at time of the trial, acquired after suit brought, is not sufficient,<sup>1</sup> though in such case the judgment in favor of defendant may be for costs only, and not for a return.<sup>2</sup>

One joint-tenant of a chattel may not maintain the action alone, either for the whole, or for a moiety.<sup>3</sup>

Goods in custody of the law, *i.e.*, rightfully in the possession of a sheriff or other officers, are not repleviable.<sup>4</sup> And the attempt to replevy from the officer of the law was punishable as a contempt.<sup>5</sup> But if the officer be wrongfully in possession, as if he levy upon and take goods exempt from execution, or goods not the property of the execution debtor, replevin will lie.<sup>6</sup> Held not the proper remedy, however, as to goods exempt from execution, in Pennsylvania and Illinois.<sup>7</sup>

Goods, then, seem to have been called personal, because the remedy for their abstraction was against the *person* who had taken them away, or because, in the words of Lord Coke, they were to be recovered by personal actions.<sup>8</sup>

Chattels personal are the subjects of the present treatise. In an-

*v. Eveleth*, 9 Met., 235; *Fairbank v. Phelps*, 22 Pick., 538; *Barry v. O'Brien*, 103 Mass., 521; *Sager v. Blain*, 5 Hand, 449; *Forth v. Pursley*, 82 Ill., 152.

<sup>1</sup> *Campbell v. Williams*, 39 Iowa, 646; *Wheeler v. Train*, 3 Pick., 255.

<sup>2</sup> *Wheeler v. Train*, 3 Pick., 255.

<sup>3</sup> *Reinheimer v. Hemingway*, 35 Pa. St., 432; *D'Wolf v. Harris*, 4 Mason, 515.

<sup>4</sup> *Jennes v. Jolliffe*, 9 Johns., 384; *Buckley v. Buckley*, 9 Nev., 373-379; *Raiford v. Hyde*, 36 Ga., 93; *Phillips v. Harris*, 3 J. J. Marsh., 122; *Reeside v. Tischer*, 2 Harr. & G., 320; *Watkins v. Page*, 2 Wis., 69; *Hall v. Tuttle*, 2 Wend., 478; *Morgan v. Craig*, Hardin, 108; *McLeod v. Oates*, 8 Ire., Law, 387; *Taylor v. Carryl*, 20 How., 583; *Freeman v. Howe*, 24 How., 456.

<sup>5</sup> *Funk v. Israel*, 5 Iowa, 450; *Phillips v. Harriss*, 3 J. J. Marsh., 123; *Cooley v. Davis*, 34 Iowa, 128, 220; *Hagan v. Denell*, 24 Ark., 216; *Goodrich v. Firtz*, 4 Ark., 525; *Allen v. Staples*, 6 Gray, 493; *Shearick v. Huber*, 6 Binn., 4; *Goodheart v. Bowen*, 2 Bradw. (Ill.), 578; *Badlam v. Tucker*, 1 Pick., 389; *Brownell v. Manchester*, *Id.*, 232, 234; *Milliken v. Selye*, 6 Hill, 623; *Squires v. Smith*, 10 B. Mon., 33.

<sup>6</sup> *Williams v. Miller*, 16 Conn., 144; *Wallingsford v. Bennett*, 1 Mackey, 303; *Ringgold v. Williamson*, 4 Cr. C. C., 39; *Hunt v. Pratt*, 7 R. I., 283; *Gibson v. Jenney*, 15 Mass., 205; *Foss v. Stewart*, 14 Maine, 312; *Bean v. Hubbard*, 4 Cush., 85; *Dego v. Jennison*, 10 Allen, 410; *Leavitt v. Metcalf*, 2 Vt., 343; *Haskill v. Andros*, 4 Vt., 609; *Mulholm v. Cheney*, Addis. (Pa.), 301; *Stone v. Bird*, 16 Kan., 488.

<sup>7</sup> *Bousell v. Cowley*, 8 Wright, 442; *Hammer v. Fresi*, 7 Harris, 255; *Hare v. Stegall*, 60 Ill., 380.

<sup>8</sup> See Principles of the Law of Real Property, 7.

cient times they consisted entirely of movable goods, visible and tangible in their nature, and in the possession either of the owner or of some other person on his behalf. Nothing of an incorporeal nature was anciently comprehended within the class of chattels personal. In this respect the law of personal property strikingly differs from that of real property, in which, from the earliest times, incorporeal hereditaments occupied a conspicuous place. But, although there was formerly no such thing as an incorporeal chattel personal, there existed not unfrequently a right of action, or the liberty of proceeding in the courts of law, either to recover pecuniary damages for the infliction of a wrong or the non-performance of a contract, or else to procure the payment of money due. Such a right was called, in the Norman French of our early lawyers, a *chose* or thing *in action*, whilst movable goods were denominated *choses in possession*. Choses in action, though valuable rights, had not in early times the ordinary incident of property, namely, the capability of being transferred;<sup>1</sup> for, to permit a transfer of such a

<sup>1</sup> A right of action for a tort is not assignable: *Gardner v. Adam*, 12 Wend., 297; *Com. v. Tuqua*, 3 Litt., 41; *Comegys v. Vasse*, 1 Peters, 123; *People v. Tioga*, 19 Wend., 73; *Oliver v. Walsh*, 6 Cal., 258; and this is true even after verdict; *Brooks v. Hanford*, 15 Abbott's Pr., 342. But a cause of action, to recover money which plaintiff had been induced to pay to defendant, by means of false representations made by the latter, is assignable: *Byxbie v. Wood*, 24 N. Y., 607; and by a statute of 1858 of the State of New York, the right of action which one has, who has been induced by fraud to execute a conveyance and part with the possession of real estate, may be assigned: *McMahon v. Allen*, 34 Barb., 275. And see *Weir v. Davenport*, 11 Iowa, 49.

The general rule is, that personal torts which die with the party, and do not survive to personal representatives, are incapable of passing by assignment: *Comegys v. Vasse*, 1 Peters, 193; *North v. Turner*, 9 S. & R., 244; *Somers v. Wild*, 4 *Id.*, 19; *O'Donnell v. Seybert*, 13 *Id.*, 54; *Freeman v. Newton*, 3 E. D. Smith, 246; *Grant v. Ludlow*, 8 Ohio St., 1; and the converse has been held true: *Sears v. Conover*, 34 Barb., 330; *Gould v. Gould*, 36 *Id.*, 270. It seems however in New York, that whether a cause of action is assignable depends mainly upon the question whether it would survive: *Denning v. Fay*, 38 Barb., 18. And in that state it has been held, that the right of a mother in the damages given by the statute of 1847, for the death of her son, is capable of assignment: *Quin v. Moore*, 15 N. Y., 432.

But other choses in action may be assigned in equity: *Dix v. Cobb*, 4 Mass., 511; *Parker v. Grout*, 11 *Id.*, 157, note; *Wheeler v. Wheeler*, 9 Cowen, 34; *Eastman v. Wright*, 6 Pick., 316; *Welsh v. Mandeville*, 1 Wheat., 236; *Brackett v. Blake*, 7 Metc., 335; *Fletcher v. Pratt*, 7 Blackf., 522; *Powell v. Powell*, 10 Ala., 900; *Wooden v. Butler*, 10 Miss., 716; *Blier v. Pierce*, 20 Vt., 25; *Porter v. Bul-*

right was, in the simplicity of the times, thought to be too great an encouragement to litigation;<sup>1</sup> and the attempt to make such a transfer involved the guilt of *maintenance* or the maintaining of another person in his suit. It was impossible, however, that this simple state of things should long continue. Within the class of choses in action was comprised a right of growing importance, namely, that of suing for money due, which right is all that constitutes a *debt*. That a debt should be incapable of transfer was obviously highly inconvenient in commercial transactions; and in early times the custom of merchants rendered debts secured by bills of exchange assignable by endorsement and delivery of the bills. But choses in action, not so secured, could only be sued for by the original creditor, or the person who first had the right of action. In process of time, however, an indirect method of assignment was discovered, the assignee being empowered to sue in the name of the assignor; and in the reign of Henry VII. it was determined that a "chose in action may be assigned over for lawful cause as a just debt, but not for maintenance, and that where a man is indebted to me in 20*l.*, and another owes him 20*l.* by bond, he may assign this

lard, 26 Me., 448; Merriweather v. Herran, 8 B. Mon., 162; Bartlett v. Pearson, 29 Me., 9; Kerr v. Day, 2 Har., 212; Anderson v. De Soer, 6 Gratt., 363; Ensign v. Kellogg, 4 Pick., 1; Champion v. Brewer, 6 Johns. Chan., 398; Lowry v. Tew, 3 Barb. Ch., 407; Mitchell v. Manufacturing Co., 2 Story, 660; Calkins v. Lockwood, 14 Conn., 226; Cannady v. Shepard, 2 Jones L., 224; and an oral transfer with notice from the assignee to the debtor, has been held sufficient: Noyes v. Brown, 33 Vt., 431; the assignee takes subject to the equities of him who issued the security assigned; Bush v. Lathrop, 22 N. Y., 535; Robert v. Carter, 24 How. Pr., 44; Faull v. Tinsman, 36 Pa. St., 108; Smith v. Rogers, 14 Ind., 224; Eldred v. Hazlett, 33 Pa. St., 307; Warner v. Whilliaker, 6 Mich., 133; Cornish v. Bryan, 2 Stockt., 146; Horstman v. Gerker, 49 Pa. St., 281.

A contingent debt may be assigned in equity: Crocker v. Whitney, 10 Mass., 316; and a judgment and execution: Dunn v. Snell, 15 Mass., 481; Allen v. Holden, 9 Id., 133; Brown v. Maine Bk., 11 Id., 153; Pearson v. Talbot, 4 Litt., 435; Vanhouten v. Reilly, 6 Sm. & Marsh., 440; Faull v. Tinsman, 36 Pa. St., 108; McDonald v. McDonald, 5 Jones' Eq., 211.

To make an assignment valid at law, that which is the subject of it must have an existence, actual or potential, at the time of assignment: Mitchell v. Winslow 2 Story, 630.

An interest created by a pledge of personal property can be assigned: Russell v. Fillmore, 15 Vt., 130.

The legal interest in a judgment is not assignable either by statute or common law: Richardville v. Cummins, 5 Blackf., 48.—G. & W.

<sup>1</sup> Lampet's case, 10 Rep., 43 a.

bond and debt to me in satisfaction, and I may justify for suing it *in the name of the other at my own costs.*" Choses in action, having

<sup>1</sup> Bro. Abr. tit., Chose in Action, pl. 3, 15 Hen. VII., c. 2.

The assignee of a chose in action has an equitable right, enforceable at law in the assignor's name: *Dix v. Cobb*, 4 Mass., 511; *Parker v. Grout*, 11 Id., 157, note; *Wheeler v. Wheeler*, 9 Cowen, 34; *Eastman v. Wright*, 6 Pick., 316; *Welsh v. Manderville*, 1 Wheat., 236; *Hendrick v. Glover*, Geo. Decis., part 1, 63; *Marcune v. Hereford*, 8 Dana, 1; *Dunklin v. Wilkins*, 5 Ala., 109; *Rawson v. Jones*, 1 Scam., 291; *Van Houten v. Reilly*, 6 Sm. & M., 440; *Broughten v. Badgett*, 1 Kelly, 75; *Sims v. Radcliffe*, 3 Rich., 287; *Pollard v. Somerset Mut. Fire Ins. Co.*, 42 Me., 221; *Hooker v. Eagle Bk.*, 30 N. Y., 83. But the assignee of a bond cannot, at common law, sue thereon in his own name: *Skinner v. Somers*, 14 Mass., 107; *Smock v. Tayler*, Cox, 177; *Sheppard v. Stites*, 2 Halst., 94; *Sayre v. Lucas*, 2 Stew., 259; *Flanagan v. Camden Mutual Insurance Co.*, 1 Dutch., 506; and a creditor cannot by assigning portions of his claim to different persons, give them separate rights of action: *The Hull of a new Ship*, Dav., 199.

If a negotiable note be assigned and delivered, for a valuable consideration, without endorsement, the title passes, and the assignee may recover in the name of the payee: *Jones v. Willett*, 3 Mass., 304. But a certificate of deposit payable to the depositor, or order, in currency, is not a negotiable instrument, and the indorsee thereof cannot maintain an action upon it in his own name: *Loudon, etc. Soc. v. Hagerstown, etc.*, Bk., 36 Pa. St., 498.

And "the holder of bonds issued by a corporation, payable to bearer, may maintain an action on them in his own name. Such bonds are not strictly negotiable under the law merchant, as are promissory notes and bills of exchange. They are, however, instruments of a peculiar character, and being expressly designed to be passed from hand to hand, and by common usage actually so transferred, are capable of passing by delivery so as to enable the holder to maintain an action on them in his own name. Possession is *prima facie* evidence of ownership:" *Carr v. Le Fevre*, 27 Pa. St., 418. And see also on the same subject: *Gregory v. Dozier*, 6 Jones L., 4; *Morris Canal Co. v. Fisher*, 1 Stockt., 667; *McCoy v. The County*, 7 Am. L. Reg., 193; *Mercer Co. v. Hackett*, 1 Wall. U. S., 83; *Gelpeke v. Dubuke*, *Id.*, 175; *Meyer v. Muscatine*, *Id.*, 384; *Murray v. Lardner*, 2 *Id.*, 110; *Co. of Weaver v. Armstrong*, 8 Pa. St., 63. Where bonds were issued by a railway company in blank, it was held by the Supreme Court of the United States to be the intention of the company to make the bonds negotiable, and payable to the holder as bearer, and that the holder might fill up the blank with his own name, or make them payable to himself, or bearer, or order. *White v. Vt. & Mass. R. R. Co.*, 21 How., 575.

A right to property held adversely, or a right growing out of an executory contract, is unsusceptible of legal assignment: *Grelly v. Willcocks*, 2 Johns., 1; *Flint etc., R. R. Co. v. Dewey*, 14 Mich., 477; *Kendall v. United States*, 7 Wall. U. S., 113.

An obligation of record, or under real, may be equitably assigned by a writing unsealed: *Morange v. Edwards*, 1 E. D. Smith, 414; *Dunn v. Swell*, 15 Mass., 485; *Dawson v. Coles*, 16 Johns., 51; or by parol: *Ford v. Stuart*, 19 Johns., 342;

now become assignable, became an important kind of personal property; and their importance was increased by an act of the following reign,<sup>1</sup> whereby the taking of interest for money, which had previously been unlawful, was rendered legal to a limited extent. Loans and mortgages soon became common, forming a kind of incorporeal personal property unknown to the ancient law. In the reign of Queen Anne, promissory notes were rendered, by act of parliament, assignable by indorsement and delivery, in the same manner as inland bills of exchange.<sup>2</sup> But other choses in action continue to this day assignable at law only by empowering the assignee to sue in the name of the assignor.

In addition to the mass of incorporeal personal property, which now exists in the form of choses in action recoverable by action at law, there exist also equitable choses in action, or rights to be enforced by suit in equity; of these a pecuniary legacy is a familiar instance, for which, if the executor withhold payment, the legatee can maintain no action at law<sup>3</sup>, but must bring a suit in equity. This kind of chose in action may be assigned directly from one person to another, and the assignee may sue in equity in his own name. For equity, being of more modern origin than the common law, is

*Jones v. Witter*, 13 Mass., 304; *Lacey v. Lacey*, 7 Pa. St., 251; *Sexton v. Fleet*, 2 Hilt., 477.

Statutes now exist in many of the States under which the assignees of choses in action may sue in their own names.—G. & W.

<sup>1</sup> Stat., 37 Hen. VIII., c. 9.

<sup>2</sup> Stat. 3 & 4 Anne, c. 9 made perpetual by stat. 7 Anne, c. 25, s. 3.

<sup>3</sup> *Deeks v. Strutt*, 5 Term Rep., 690; *Braithwaite v. Skinner*, 5 M. & W. 313.

An action at law for a pecuniary legacy has been maintained in some of the States, and in some is expressly given by statute: *Cromer v. Pinckney*, 3 Barb., Ch., 466; *Becker v. Becker*, 7 John., 99; *Farwell v. Jacobs*, 4 Mass., 634; *Pettigrew v. Pettigrew*, 1 Stew., 580; *Morrow v. Breinzel*, 2 Rawle, 185; *App v. Driesbach*, *Id.*, 301; *Colt v. Colt*, 32 Conn., 422; *Gilliland v. Beedin*, 63 Pa. St., 393; but in Pennsylvania the question of assets, and in what proportion, in case of a deficiency, the claimant is to be paid, is to be determined by the Orphans' Court: *Bredin v. Gilliland*, 28 Leg. Intell., p. 235; *Burt v. Herron*, 66 Pa. St., 400. In which State it has also been decided that an action at common law will not lie on a decree of the Orphans' Court for the payment of a legacy out of the funds in the hands of an executor: 34 Pa. St., 354; nor to recover a distributive share of a decedent's estate: *Ashford v. Ewing*, 25 *Id.*, 213. In Mississippi, a specific legacy may be recovered by an action at law: *Wooten v. Howard*, 2 Sm. & Marsh., 527.—G. & W.

guided in its practice by rules more adapted to the exigencies of modern society.

In modern times, also, several species of property have sprung up which were unknown to the common law. The funds now afford an investment, of which our forefathers were happily ignorant, whilst canal and railway shares, and other shares in joint stock companies, and patents and copyrights, are evidently modern sources of wealth. These kinds of property are all of a personal nature, many of them having been made so by the acts of parliament under the authority of which they have originated. For want of a better classification, these subjects of personal property are now usually spoken of as *choses in action*. They are, in fact, personal property of an incorporeal nature, and a recurrence to the history of their classification amongst *choses in action* will, as we shall hereafter see, help to explain some of their peculiarities.

Such is the general outline of the subjects of modern personal property. They are distinguished from real property by being unaffected by the feudal rules of tenure, by being alienable by methods altogether different, by passing in the first instance to the executors, when bequeathed by will, and by devolving, on their owner's intestacy, not on his heir, but on an administrator, appointed formerly by the Ecclesiastical Court, but now by the Court of Probate, by whom they are distributed amongst the next of kin of the deceased. On the first of these characteristics, however, mainly depends the nature of the property which exists in things personal. The first lesson to be learned on the nature of real property is this—that of such property there can be no such thing as an absolute ownership; the utmost that can be held or enjoyed in real property is an estate.<sup>1</sup> There may be an estate for life, or an estate tail, or an estate in fee simple; but, according to the law of England, there cannot exist over landed property any absolute and independent dominion. All the land in the kingdom is the subject of tenure; and, if the estate is not holden of any subject, at any rate it must be held of the crown. With regard to personal property, however, the primary rule is precisely the reverse. Such property is essentially the subject of absolute ownership, and cannot be held for any estate. It is true that the phrase *personal estate* is fre-

<sup>1</sup> Principles of the Law of Real Property, 16.

quently used as synonymous with personal property ; but this general use of the term *estate* should not mislead the student into the supposition that there can be any such thing as an estate in personalty properly so called.<sup>1</sup> The rule that no estate can subsist in personal property would seem to have originated in the nature of such property in early times. Goods and chattels of a personal kind, in other words, movable articles, then formed, as we have seen, the whole of a man's personal estate. And such articles, it is evident, may be the subjects of absolute ownership, and have not those enduring qualities which would render them fit to be holden by any kind of feudal tenure. As personal property increased in value and variety, many kinds of property of a more permanent nature became, as we have seen, comprised within the class of personal, such as leases for years, of whatever length, and Consolidated Bank Annuities. But the rule that there can be no estate in chattels, the reason of which was properly applicable only to movable goods, still continues to be applied generally to all sorts of personal property, both corporeal and incorporeal. The consequences of this rule, as we shall hereafter see, are curious and important. But, in the first place, it will be proper to consider the laws respecting those movable chattels, or choses in possession, which constitute the most ancient and simple class of personal property ; the class, however, which has given to the rest many of the rules for regulating their disposition.

<sup>1</sup> See pp. 33-35.

# PART I.

## OF CHOSSES IN POSSESSION.

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### CHAPTER I.

#### OF CHATTELS WHICH DESCEND TO THE HEIR.

CHOSSES in possession are movable goods, such as plate, furniture, farming stock, both live and dead, locomotive engines and ships. These, as has been before remarked, are essentially the subjects of absolute ownership, and cannot be held by estates; they are alienable by methods altogether different from those employed for the conveyance of landed property, and they devolve in the first instance on the executor of the will of their owner, or on the administrator of his effects, if he should die intestate. There are, however, some kinds of chosses in possession which form exceptions to the general rule: these consist of certain chattels so closely connected with land that they partake of its nature, pass along with it, whenever it is disposed of, and descend along with it, when undisposed of, to the heir of the deceased owner. The chattels which thus form exceptions are the subject of the present chapter: they consist principally of *title deeds*, *heir-looms*, *fixtures*, *chattels vegetable*, and *animals feræ naturæ*. Of each in their order.

Title deeds, though movable articles, are not strictly speaking chattels. They have been called the sinews of the land,<sup>1</sup> and are so closely connected with it that they will pass, on a conveyance of the land, without being expressly mentioned: the property in the deeds passes out of the vendor to the purchaser simply by the grant of the land itself.<sup>2</sup> In like manner a devise of lands by

<sup>1</sup> Co. Litt., 6 a.

<sup>2</sup> *Harrington v. Price*, 3 B. & Ad., 170 (23 E. C. L.); *Philips v. Robinson*, 4 Bing., 106 (13 E. C. L.); s. c., 12 Moore, 308.



will entitles the devisee to the possession of the deeds; and if a tenant in fee simple should die intestate, 'the title deeds of his lands will descend along with them to his heir at law.<sup>1</sup> In former times, when warranty was usually made on the conveyance of lands,<sup>2</sup> the rule was that the feoffor should retain all deeds containing warranties made to himself or to those through whom he claimed, and also all such deeds as were material for the maintenance of the title to the land.<sup>3</sup> But if the feoffment was made without any warranty, the feoffee was entitled to the whole of the deeds; for the feoffor could receive no benefit by keeping them, nor sustain any damage by delivering them.<sup>4</sup> Warranties have now fallen into disuse; but the principle of the rule above stated still applies when the grantor has any other lands to which the deeds relate, or retains any legal interest in the lands conveyed; for in either of these cases he has still a right to retain the deeds.<sup>5</sup> And if the grantor should retain merely an equitable right to redeem the lands, as in the case of a mortgage in fee simple, it has been said that this equitable right is a sufficient interest in the lands to authorize him to withhold the deeds, unless they are expressly granted to the mortgagee.<sup>6</sup> It is very questionable, however, whether a legal right ought to be attached to an interest merely equitable. And the doctrine last mentioned is opposed by more recent decisions in another court.<sup>7</sup>

<sup>1</sup> Wentworth's Office of an Executor, 14th ed., 152; Williams on Executors, pt. 2, book 2, c. 3, s. 3.

<sup>2</sup> See Principles of the Law of Real Property, 344, 1st ed.; 346, 2d ed.; 865, 4th ed.; 376, 5th ed.; 399, 6th ed.; 407, 7th ed.; 426, 8th ed.

<sup>3</sup> Buckhurst's Case, 1 Rep., 1 b.

<sup>4</sup> Buckhurst's Case, 1 Rep., 1 a.

<sup>5</sup> Bro. Abr. tit. Charters de Terre, pl., 53; Yea v. Field, 2 T. Rep., 708; see, however, Sugd. Vend. & Pur., 367, 13 ed.; 2 Prest. Conv., 466.

<sup>6</sup> Davies v. Vernon, 6 Q. B., 443, 447 (51 E. C. L.)

<sup>7</sup> Goode v. Burton, 1 Exch. Rep., 189; Newton v. Beck, 3 H. & N., 220.

Since the recording acts, which are in universal operation in the American States, the different questions which have arisen in England as to the possession of title deeds have become comparatively unimportant, as the recording is, in all cases, for the purposes of evidence and of notice to subsequent purchasers, made of the same validity as the production or possession of the title papers: *Wilt v. Franklin*, 1 Binn., 522. "In one case only," it was said by McKean, C. J., "can the mortgagee be affected by suffering the title-deeds to remain in the hands of the mortgagor, and that is where, after the execution of the mortgage, and before the same is recorded, the mortgagor, on the strength of the title papers in his hands, borrows money on a second mortgage. If this second loan was made

If a conveyance of lands should be made by way of use, thus, if lands should be granted to A. and his heirs to the use of B. and his heirs, it has been said that the title deeds of the land will belong to A., the grantee; because, although the Statute of Uses<sup>1</sup> conveys the legal estate in the lands from A. to B., it does not affect the title deeds, which must consequently still remain vested in A.<sup>2</sup> But this doctrine has been justly questioned, on the ground that the legislative conveyance from A. to B., effected by the Statute of Uses, ought to be at least as powerful as the common law conveyance of the lands to A.; and if the latter conveyance can carry with it the deeds relating to the land, the former conveyance should be considered as powerful enough to do the same;<sup>3</sup> and it has accordingly been so decided in a case in Ireland.<sup>4</sup>

The tenant of an estate in fee simple in lands possesses the highest interest which the law of England allows to any subject; and such a tenant possesses also an absolute property in the title deeds, which he may destroy at his pleasure or sell for the value of the parchment.<sup>5</sup> But if the lands to which deeds relate should be settled on any person for life or in tail, a qualified ownership will arise with respect to the deeds, different in its nature from that simple property which is usually held in chattels personal. As the lands are now held for a limited estate, so a limited interest in the deeds belongs to the tenant. The tenant for life or in tail, when in possession of the lands, being the freeholder for the time being, is entitled to the possession of the deeds;<sup>6</sup> whereas the tenant

without knowledge of the first incumbrance, and before the first mortgage was put into the recorder's office, then I should apprehend the first mortgage should be postponed:" *Evans v. Jones*, 1 Yeates, 172. These remarks were made under the Pennsylvania Act of 1715, which gave the mortgagee six months within which to record his deed, and, if correct, would apply in Pennsylvania to the case of vendees, who have also six months.—*G. & W. Record* is evidence if acknowledgment must precede record: *Ward v. Fuller*, 15 Pick., 188.

<sup>1</sup> 27 Hen. VIII., c. 10.

<sup>2</sup> 1 Saund. Uses, 4th ed., 119; 5th ed., 117.

<sup>3</sup> *Sugd. Vend. & Pur.*, 366, 13th ed.; *Co. Litt.* 6a, n. (4).

<sup>4</sup> *Nalane v. Minoughan*, 14 Ir. C. L. R., 540, dissentiente Hayes, J.

<sup>5</sup> *Cro. Eliz.*, 496.

<sup>6</sup> *Ford v. Peering*, 1 Ves. Jr., 76; *Strode v. Blackburne*, 3 Ves., 225; *Garner v. Hannington*, 22 Beav., 627; *Allwood v. Heywood*, 11 Exch., W. R., 291; s. c. 1 Hurlst. & Colt., 745.

The tenant for life is *prima facie* entitled to the possession of the title deeds, and although in a proper case the court will grant an inspection of them to the

for a mere term of years of whatever length, not having the freehold or feudal possession of the lands, has no right to deeds which relate to such freehold;<sup>1</sup> although deeds relating only to the term belong to such a tenant, and will pass, without any express grant, to the assignee of the term.<sup>2</sup> The tenant for life or in tail in possession, though entitled to the possession or custody of the deeds which relate to the inheritance, has no right to injure or part with them;<sup>3</sup> he has an interest in the title deeds correspondent only to his estate in the lands; and if he should part with the deeds, even for a valuable consideration, the remainder-man, on coming into possession of the lands, will nevertheless be entitled to the possession of the deeds, just as if the tenant for life or in tail had kept them in his own custody.<sup>4</sup>

Heir-looms, strictly so called, are now very seldom to be met with. They may be defined to be such personal chattels as go, by force of a *special custom*, to the heir, along with the inheritance, and not to the executor or administrator of the last owner.<sup>5</sup> The owner of an heir-loom cannot by his will bequeath the heir-loom, if he leave the land to descend to his heir; for in such a case the force of the custom will prevail over the bequest, which, not coming into operation until after the decease of the owner, is too late to supersede the custom.<sup>6</sup> According to some authorities, heir-looms consist only of bulky articles, such as tables and benches fixed to the freehold;<sup>7</sup> but such articles would more properly fall within

remainder-man, the precise object of the motion must be set forth, and the court will exert a paternal authority to see that it is for no improvident or improper purpose: *Shaw v. Shaw*, 12 Price's Exchequer, 163; *Allwood v. Heywood*, 1 Hurlst. & Colt, 745.

The right to title deeds goes with the land: *Lord Buckhurst's Case*, 1 Co. Rep., 2; *Atkinson v. Baker*, 4 T. R., 229; and they are so completely part of the realty that at common law no larceny could be committed of them: 3 Inst., 109. —G. & W.

<sup>1</sup> *Churchill v. Small*, 8 Ves., 323; *Harper v. Faulder*, 4 Mad., 129, 133; *Wiseman v. Westland*, 1 You. & Jerv., 117; *Hatham v. Somerville*, 5 Beav., 360.

<sup>2</sup> *Hooper v. Ramsbottom*, 6 Taunt., 12 (1 E. C. L.).

<sup>3</sup> Bro. Abr. tit. Charters de Terre, pl. 36. As to production see *Davis v. Earl of Dysart*, 20 Beav., 405.

<sup>4</sup> *Davies v. Vernon*, 6 Q. B., 443 (51 E. C. L.); *Easton v. London*, 12 Exch., W. R., 53; 33 L. J., Exch., 34.

<sup>5</sup> See Co. Litt., 18 b.

<sup>6</sup> Co. Litt., 185 b.

<sup>7</sup> Spelman's Glossary, voce Heir-Loom. See Williams on Executors, pt. 2, bk. 2, ch. 2, s. 3.

the class of fixtures, of which we shall next speak. The ancient jewels of the crown are heir-looms.<sup>1</sup> And if a nobleman, knight or esquire be buried in a church, and his coat armor or other ensigns of honor belonging to his degree be set up, or if a tombstone be erected to his memory, his heirs may maintain an action against any person who may take or deface them.<sup>2</sup> The boxes in which the title deeds of land are kept are also in the nature of heir-looms, and will belong to the heir or devisee of the lands; for such boxes "have their very creation to be the houses or habitations of deeds";<sup>3</sup> and accordingly a chest made for other uses will belong to the executor or administrator of the deceased, although title deeds should happen to be found in it. In popular language the term "heir-loom" is generally applied to plate, pictures, or articles of property which have been assigned by deed of settlement or bequeathed by will to trustees, in trust to permit the same to be used and enjoyed by the persons for the time being in possession, under the settlement or will, of the mansion-house in which the articles may be placed. Of this kind of settlement more will be said hereafter.

Fixtures are such movable articles or chattels personal as are fixed to the ground or soil, either directly, or indirectly by being attached to a house or other building. The ancient common law, regarding land as of far more consequence than any chattel which could be fixed to it, always considered everything attached to the land as a part of the land itself—the maxim being *quicquid plantatur solo, solo cedit*.<sup>4</sup> Hence it followed that houses themselves, which consist of aggregates of chattels personal (namely, timber and bricks) fixed to the land, were regarded as land, and passed by a conveyance of the land without the necessity of express mention; and this is the case at the present day.<sup>5</sup> So now, a conveyance of a house or other building, whether absolutely or by way of mortgage, will comprise all ordinary fixtures, such as stoves, grates, shelves, locks, etc.,<sup>6</sup> and also fixtures erected for the

<sup>1</sup> Co. Litt., 18 b.

<sup>2</sup> *Ibid.*

<sup>3</sup> Wentworth's Office of an Executor, 157, 14th ed.

<sup>4</sup> Herlakenden's Case, 4 Rep., 64 a; Waterman v. Soper, 1 Ld. Raym., 737; Spark v. Spicer, 1 Lord Raymond, 738; Mackintosh v. Trotter, 3 Mee. & Wels., 184, 186; Williams on Executors, pt. 2, bk. 2, ch. 3, s. 2.

<sup>5</sup> See Williams' Real Property, 13; 6th Am. ed., 14, 15.

<sup>6</sup> Colegrave v. Dias Santos, 2 Barn. & Cress., 76 (9 E. C. L.); s. c., 3 Dowl. &

purposes of trade,<sup>1</sup> without any express mention, unless an intention to withhold the fixtures can be gathered from the context.<sup>2</sup> So on the decease of a tenant in fee simple, the devisee of a house, or the heir at law in case of intestacy, will be entitled generally to the fixtures set up in it.<sup>3</sup> The ancient rule respecting fixtures has been greatly relaxed in favor of tenants for terms of years, who are now permitted to remove articles set up by them for the purposes of trade or of ornament or domestic convenience,<sup>4</sup> provided they remove them before the expiration of their tenancy.<sup>5</sup> But the old rule still prevails with regard to agricultural fixtures, which, though set up by the tenant, become, by being fixed to the soil, the property of the landlord.<sup>6</sup>

A relaxation of the old rule has also been made in favor of the executors of a tenant for life, who appear to be allowed to remove fixtures set up by their testator for the purposes of trade or of ornament or domestic convenience.<sup>7</sup> But the rule of the common law still retains much of its force as between the devisee or heir of a tenant in fee simple and his executor or administrator. Thus a tenant for years may remove ornamental chimney-pieces set up by him during his tenancy;<sup>8</sup> but if erected by a tenant in fee simple, they will pass with the house to the devisee or heir.<sup>9</sup> So machinery employed in carrying on iron works or collieries may be removed by a lessee for years, if erected by him; but if erected by a tenant in fee simple, such machinery, even though

Ry., 255: *Longstaff v. Meagoe*, 2 Ad. & Ell., 167 (29 E. C. L.); *Hitchman v. Walton*, 4 Mee. & Wels., 409; *Ex parte Barclay*, 5 De G., M. & G., 403; *Mathews v. Fraser*, 2 Kay & John., 536; *Williams v. Evans*, 23 Beav., 239; *Walmesley v. Milne*, 7 C. B. N. S., 115 (97 E. C. L.); *Metropolitan Counties etc. Society v. Brown*, 26 Beav., 454.

<sup>1</sup> *Cullwick v. Swindell*, M. R., L. Rep., 3 Eq., 249; *Climie v. Wood*, Law Rep., 3 Exch., 257.

<sup>2</sup> *Hare v. Horton*, 5 Barn. & Adol., 715 (27 E. C. L.).

<sup>3</sup> *Shep. Touch.*, 470.

<sup>4</sup> *Grymes v. Boweren*, 6 Bing., 437 (19 E. C. L.).

<sup>5</sup> *Lyde v. Russell*, 1 Barn. & Adol., 394 (20 E. C. L.); *Leader v. Homewood*, 5 C. B. N. S., 546 (94 E. C. L.).

<sup>6</sup> *Elwes v. Mawe*, 3 East, 38; s. c., Sm. L. C., 9th Am. ed., 1423.

<sup>7</sup> *Lawton v. Lawton*, 3 Atk., 14. See *D'Eyncourt v. Gregory*, M. R., 36 Law Journ. N. S., 107; s. c., L. Rep., 3 Eq., 382.

<sup>8</sup> *Bishop v. Elliot*, Ex. Ch., 1 Jur. N. S., 962; s. c., 24 Law J. Exch., 229; s. c. 11 Ex. Rep., 113.

<sup>9</sup> *Dudley v. Warde*, Amb., 113.

removable without injury to the freehold, will belong to the heir or the devisee of the land.<sup>1</sup> However it seems that pier glasses, fixed by nails, and not let into panels, and hangings fastened up for ornament, will now belong to the executor or administrator of a tenant in fee simple as part of his personal estate.<sup>2</sup>

Where fixtures are demised to a tenant along with the house, mill or other building in which they may happen to be, the property in the fixtures still remains in the landlord, subject to the tenant's right to the possession and use of them during his term;<sup>3</sup> and if they should be severed from the building by the tenant or any other person, or should be separated by accident, the landlord will acquire an immediate right to the possession of them.<sup>4</sup> In this respect they are subject to the same rules as timber, which, as we shall see, is equally a part of the inheritance until severed, and when cut becomes the personal property of the owner of the fee. Fixtures, which would descend with the house or building to the heir of the owner of the fee on intestacy, are not in fact his goods and chattels properly so called.<sup>5</sup>

The term *fixtures* is sometimes used by both courts and text-writers to indicate, as the word itself implies, chattels annexed to the freehold which must *remain fixed* or annexed thereto, or which, in other words, have become and must remain a part of the realty; while, on the other hand, it is frequently used in precisely the opposite sense, to denote chattels which may be *unfixed*, or detached from the freehold, and taken away. Thus Bouvier's Law Dictionary, Title Fixtures, defines them "Personal chattels affixed to real estate, which may be severed and removed by the party who has affixed them, or by his personal representative, against the will of the owner of the freehold;" while Mr. Hill, in his admirable little work on Fixtures, defines them to be "A thing so fixed to the realty that it cannot be taken away, and that the owner of the land necessarily *owns* the thing, so that it cannot be removed without his permission," citing in support of his definition forty-five de-

<sup>1</sup> Fisher v. Dixon, 12 Cl. & Fin., 312.

<sup>2</sup> Cave v. Cave, 2 Vern., 508; Squire v. Mayor, 2 Eq. Ca. Abr., 430, pl. 7; s. c. 2 Freem., 249.

<sup>3</sup> Boydell v. M'Michael, 1 Cro. Mee. & Rosc., 117; Hitchman v. Walton, 4 Mee. & Wels., 409.

<sup>4</sup> Farrant v. Thompson, 5 Barn. & Ald., 826 (7 E. C. L.)

<sup>5</sup> Winn v. Ingilby, 5 Barn. & Ald., 625 (7 E. C. L.).

cided cases, in which the courts have used the word in that sense.<sup>1</sup> In view of this contrariety of opinion as to the proper meaning of the term, it is always advisable to determine from the context in which of these opposing senses it is employed.

The question of immovability depends mainly upon two considerations, namely: The *relation to each other* of the parties between whom the question arises, and the *nature and purposes* of the annexation.

Where the question arises between heir or devisee and executor or administrator, vendor and vendee, or mortgagor and mortgagee, the rule *quicquid plantatur solo, solo cedit*, is applied with much rigidity. Where the question is between landlord and tenant, the rigor of that rule is greatly relaxed—almost, in the light of some of the decisions, to the abolition of the rule itself.

Thus, as between heir and executor, vendor and vendee, or mortgagor and mortgagee, all machinery erected upon the land, with whatever belongs to such machinery, though detachable from it, such as the machinery used in taking coal from a coal mine;<sup>2</sup> manufacturing implements affixed by solder, screws or the like;<sup>3</sup> a cotton gin, affixed to the gin-house only by the belts or gearing,<sup>4</sup> as, also, the gearing itself;<sup>5</sup> a steam engine and apparatus used to drive a bark-mill in a tan-yard;<sup>6</sup> a mill-stone detached from the mill to be picked,<sup>7</sup> and a saw detached from the mill to be sharpened;<sup>8</sup> stoves set in brick work or permanently attached;<sup>9</sup> doors, window-blinds and shutters, though actually detached at the time;<sup>10</sup> a movable anvil used in connection with a fixed steam-hammer;<sup>11</sup> bathtubs, with the necessary pipes for conducting water; an ornamental

<sup>1</sup> See further *Amos & Fer. Fixtures*, 2; *Elwes v. Mawe*, 3 East, 38; s. c. *Smith's Leading Cas.*, 9th Am. ed., 1423; *Sheer v. Ritchie*, 5 M. & W., 175; *Schouler's Pers. Prop.*, vol. i., s. 112; *Broom's Leg. Max.*, 404; *Burrill's Law Dict.*, "Fixture."

<sup>2</sup> *Fisher v. Dixon*, 12 Cl. & Fin., 312.

<sup>3</sup> *Mathis v. Freeman*, 2 Kay & Johnson, 536.

<sup>4</sup> *Fairis v. Walker*, 1 Bailey, 540.

<sup>5</sup> *M'Kenna v. Hammond*, 3 Hill, S. C., 331; *Bratton v. Clawson*, 2 Strobb., 478.

<sup>6</sup> *Ives v. Oglesby*, 7 Watts, 106.

<sup>7</sup> *Walker v. Sherman*, 20 Wend., 639.

<sup>8</sup> *Burnside v. Twitchell*, 43 N. H., 390.

<sup>9</sup> *Goddard v. Chase*, 7 Mass., 432; *Blethen v. Towle*, 40 Me., 310.

<sup>10</sup> *Winslow v. Merchants' Ins. Co.*, 4 Met., 306, 314.

<sup>11</sup> *Met. Co. Society v. Brown*, 26 Beav., 454.

statue and a sun-dial, though placed in the grounds after execution of the mortgage;<sup>1</sup> and, in short, whatever is annexed to the freehold by being let into the soil, or annexed to it, or erected upon it, to be habitually used there, particularly if for the purpose either of enjoying the realty or of deriving profit therefrom, becomes a part of the freehold, and is not removable.<sup>2</sup>

A planing machine, a turning lathe, a circular saw and frame, and a boring machine, though spiked to the floor, studs and joists of the building, but which were removable without injury to the building or machinery, were held personalty in Vermont.<sup>3</sup>

Schmitz v. Scheifele<sup>4</sup> is to the effect that the rigidity of the rule as between mortgagor and mortgagee is relaxed where the question is between the latter and the mortgagor's judgment creditors.

Whether chandeliers are removable as between heir and executor, mortgagor and mortgagee, and vendor and vendee, is a disputed question.<sup>5</sup>

The locomotives and rolling stock of railroad companies have

<sup>1</sup> Snedeker v. Waring, 2 Kern., 170.

<sup>2</sup> See also Voorhis v. Freeman, 2 Wat. & Serg., 116; Powell v. Mfg. Co., 3 Mass., 459; Farrar v. Stackpole, 6 Greenleaf, 154; Sparks v. State Bk., 7 Blackf., 469; Bratton v. Clawson, 2 Strobb., 478; Degraffenreid v. Scruggs, 4 Humph., 451; English v. Foote, 8 Smed. & Marsh., 444; Trull v. Fuller, 28 Me., 545; Corliss v. McLagin, 29 *Ibid.*, 115; Preston v. Briggs, 16 Vt., 124; Miller v. Plumb, 6 Cowen, 665; Harlan v. Harlan, 20 Pa. St., 303; Baker v. Davis, 19 N. H., 325; Union Bk. v. Emerson, 15 Mass., 159; Dispatch Line of Packets v. Bellamy, 12 N. H., 205; Day v. Perkins, 2 Sandf. Ch., 397; Winslow v. Merchant's Ins. Co., 4 Met., 306; Butler v. Paige, 7 *Ibid.*, 40; Sands v. Pfeiffer, 10 Cal., 259, 264; Haskin v. Woodward, 45 Pa. St., 42; Harris v. Haynes, 34 Vt., 220. And even though put up after the mortgage was given; Burnside v. Twitchell, 43 N. H., 390; Roberts v. Dauphin Bank, 19 Pa. St., 71; Johnson v. Mehaffey, 43 Pa. St., 308.

<sup>3</sup> Fullam v. Stearns, 30 Vt., 443; Cross v. Marston, 17 Vt., 533.

And see Carpenter v. Walker, 140 Mass., 416; Early v. Burtis, 40 N. J., 501; Schmitz v. Scheifele, 42 N. J., 700; Hubbell v. East Cambridge Bank, 132 Mass., 447; Pratt v. Whittier, 58 Cal., 126; Rahway Sav. Inst. v. Irving Street Bap. Ch., 36 N. J. Eq., 61; Williams v. Bailey, 3 Dane Abr., 152; Squier v. Mayer, Freeman Ch., 249; Harvey v. Harvey, 2 Str., 1141; Leonard v. Stickney, 131 Mass., 541.

<sup>4</sup> 42 N. J., 700.

<sup>5</sup> Held removable in Montague v. Dent, 10 Rich. Law, 135; Vaughan v. Holdeman, 33 Pa. St., 522; Rogers v. Crow, 40 Mo., 91; Shaw v. Lenke, 1 Daly, 487; Lawrence v. Kemp, 1 Duer, 363; McKeage v. Hanover Ins. Co., 81 N. Y., 38. Held not removable in Johnson v. Wiseman, 4 Met. (Ky.), 357; Sewell v. Angerstein, 18 L. T. N. S., 300; *Ex parte* Acton, 4 L. T. N. S., 261; *Ex parte* Wilson, 2 Mont. & Ayr., 61; Keeler v. Keeler, 31 N. J., Eq., 181.



been held part of the realty;<sup>1</sup> though the later authorities are to the contrary effect.<sup>2</sup>

When the question arises between landlord and tenant, the right to remove, instead of being the exception, has become the general rule, and the tenant may remove whatever chattels he has affixed, in the absence of stipulation or usage to the contrary, provided the removal does not cause material injury to the freehold, or deprive the articles removed of their essential character or value as personal chattels.<sup>3</sup> Thus, copper stills, kettles, steam tubs, etc., though fixed to the building;<sup>4</sup> a bark mill in a tan-yard, affixed to the soil;<sup>5</sup> machinery in a factory, though necessary to its operation;<sup>6</sup> green-houses and hot-houses;<sup>7</sup> the trees, shrubs and plants of nurserymen;<sup>8</sup> a horse power and machinery for manufacturing pumps, affixed by bolts, screws and pins;<sup>9</sup> a two-story frame building, with a stone cellar and a brick chimney, built and used by a dairyman both in connection with his business and as a residence for his family,<sup>10</sup> have been held removable by the tenant.<sup>11</sup> And plants and trees are not removable except by nurserymen, gardeners and the like.<sup>12</sup>

The English doctrine, as stated above,<sup>13</sup> excludes agricultural fixtures from the relaxation of the old rule which trade annexations enjoy, upon the theory that agricultural annexations are usually adapted to the particular farm only, and therefore were not made with any intention of removal. The American tendency is to favor

<sup>1</sup> *Farmers' Loan & Trust Co. v. Hendrickson*, 25 Barb., 484; *Titus v. Mabee*, 25 Ill., 233; *Titus v. Ginheimer*, 27 Ill., 462. And see *Pennock v. Col.*, 23 How., 117; *Minnesota Co. v. St. Paul Co.*, 2 Wall., 609, 646 and note; *Pierce v. Emery*, 32 N. H., 484.

<sup>2</sup> *Sangamon etc. R. R. Co. v. Morgan*, 14 Ill., 163; *Stevens v. Buffalo & C. R. R. Co.*, 31 Barb., 590; *Randall v. Elwell*, 52 N. Y., 521; *Hoyle v. Plattsburgh etc. R. R. Co.*, 54 N. Y., 314; *Chicago & N. W. Railway Co. v. Ft. Howard*, 21 Wis., 45.

<sup>3</sup> 2 Kent Com., 343.

<sup>4</sup> *Reynolds v. Shuler*, 5 Cow., 323.

<sup>5</sup> *Heermance v. Vernoy*, 6 Johns., 5.

<sup>6</sup> *Sturgis v. Warren*, 11 Vt., 433; *Harlan v. Harlan*, 15 Pa. St., 507.

<sup>7</sup> *Penton v. Roberts*, 2 East, 88, 90.

<sup>8</sup> *King v. Wilcomb*, 7 Barb., 263; *Miller v. Baker*, 1 Metc., 27.

<sup>9</sup> *Farrar v. Chauffetete*, 5 Denio, 527.

<sup>10</sup> *Van Ness v. Pacard*, 2 Pet., 137.

<sup>11</sup> *Contra*, however, see *Mansfield v. Blackburne*, 6 Bing., N. C. 426 (37 E. C. L.).

<sup>12</sup> *Wyndham v. Way*, 4 Taunt., 316.

<sup>13</sup> Page 18; *Elwes v. Mawe*, 3 East.; s. c., Sm. L. C., 9th Am. ed., 1423.

agricultural erections equally with trade fixtures.<sup>1</sup> But rails made into a fence are not removable.<sup>2</sup> And manure produced on agricultural lands, being produced from the grass or herbage which grew upon the land, is part of the realty; otherwise, where made in a livery stable or in any manner unconnected with husbandry.<sup>3</sup>

Domestic or ornamental annexations by a tenant, capable of removal without injury to the house or leaving it in worse condition than before the annexation, may be removed,<sup>4</sup> except that, if made to complete it, or as a permanent accession thereto, as glass in a window,<sup>5</sup> they are not removable.<sup>6</sup>

The *nature* and the *purpose or intention* of the annexation are also very material considerations affecting the question of the right to remove. Formerly the rule was that, in order to become part of the freehold, the thing in question must have been let into the soil, or else cemented to or otherwise united with something which was let into or formed part of the soil. The later tendency, however, is to pay less regard to the manner of the annexation, than the purpose of it, and the intention of the party making it. Thus, the reason of the distinction between the case of heir and executor, vendor and vendee, mortgagor and mortgagee, on the one hand, and that of landlord and tenant, on the other, is said to be that, in the former case, the ancestor, vendor or mortgagor, being the holder of the freehold, is presumed to have intended the *permanent* improvement of the premises by the annexation; while the tenant, being only a temporary occupant, is presumed to have annexed the chattel temporarily only, for his own convenience during his term.<sup>7</sup>

<sup>1</sup> Dubois v. Kelly, 10 Barb., 496; Taylor v. Townshend, 8 Mass., 411; Harkness v. Sears, 26 Ala., 493.

<sup>2</sup> Mott v. Palmer, 1 Comst., 564; Walker v. Sherman, 20 Wend., 636, 646; Glidder v. Bennett, 43 N. H., 306.

<sup>3</sup> Daniels v. Pond, 21 Pick., 367; Goodrich v. Jones, 2 Hill, 142; Middlebrook v. Convin, 15 Wend., 169; Plumer v. Plumer, 10 Fost., 558; Elwes v. Mawe, Smith's Ld. Cas., 9th Am. ed., 1464; Fay v. Muzzy, 13 Gray, 53; Wetherbee v. Ellison, 19 Vt., 379. But see, even as to agricultural tenants, Ruckman v. Outwater, 4 Dutch., 581; Smithwich v. Ellison, 2 Ire., 326.

<sup>4</sup> Hill on Fixt., s. 29.

<sup>5</sup> Co. Litt., 53 a; Poole's Case, 1 Salk., 368.

<sup>6</sup> See Powell v. McAshan, 28 Mo., 70; Leach v. Thomas, 7 C. & P., 327 (32 E. C. L.); State v. Elliott, 11 N. H., 540; Bishop v. Elliott, 11 Exch., 113; Gaffield v. Hapgood, 17 Pick., 192; Ewell on Fixt., 127, *et. seq.*

<sup>7</sup> Winalow v. Merchants' Ins. Co., 4 Metc., 310-313. Thus, the laws of gravita-

The tenant's right to remove, all the authorities agree, must be exercised during his term, or, if he holds over, before surrender of the premises.<sup>1</sup> It has been held that, though he surrender the premises without removing, the title to the removable fixtures remains in the tenant, so that, if he should afterwards re-enter and take them, though liable in trespass for the wrongful entry, the fixtures could not be recovered from him.<sup>2</sup> But, by the weight of authority, the right to remove is merely a privilege which the outgoing tenant must exercise, if at all, before he quits possession, in default of which the title to the annexations vests absolutely in the landlord.<sup>3</sup> Acceptance of a renewal of the lease, without reserving, in terms, the right to fixtures annexed during the old, is a relinquishment of the right,<sup>4</sup> especially if the new lease differs in terms and conditions from the old;<sup>5</sup> otherwise, perhaps, if the new is a mere extension of the old.<sup>6</sup>

Where, as in case of a furnace, the fixture has occasioned material alteration of the house, or where it cannot be removed without material injury to the estate, it is not removable, even between landlord and tenant, unless during the term the premises are restored to their original condition.<sup>7</sup> Nor does permission to a tenant to make improvements give, by implication, a right to remove.<sup>8</sup>

Chatte! annexations which the tenant has the right to remove,

tion, merely, were held sufficient annexation between mortgagor and the purchaser at the mortgage sale in *Snedeker v. Waring*, 2 Kern., 170, *supra*; while in *Van Ness v. Pacard*, 2 Pet., 137, *supra*, a two-story dwelling, upon a stone foundation, with a stone cellar and brick chimney, as between landlord and tenant, was held removable. See, also, *Pullen v. Bell*, 40 Me., 314; *McRea v. Cent. Nat. Bank*, 66 N. Y., 489; *Hutchins v. Masterson*, 46 Tex., 551; *Wheeler v. Bedell*, 40 Mich., 693; *Elwes v. Mawe*, *Smith's Lead. Cas.*, 9th Am. ed., 1440-9, 1458-60; *Trull v. Fuller*, 28 Me., 545; *Harkness v. Sears*, 26 Ala., 492; *Wadleigh v. Janorin*, 41 N. H., 503.

<sup>1</sup> See *Taylor's Land. and Ten.*, s. 551 and citations; *Pentor v. Robart*, 2 East, 88.

<sup>2</sup> *Holmes v. Tremper*, 20 Johns., 29; *Pemberton v. King*, 2 Dev. (Law), 376.

<sup>3</sup> See *Shepard v. Spaulding*, 4 Metc., 416; *Overton v. Williston*, 7 Casey, 155; *Elwes v. Mawe*, *Smith's Leading Cases*, 9th Am. ed., 1446, 1464, notes and citations. See the authorities fully collected and discussed in note to *Holmes v. Tremper*, 11 American Decisions, 241.

<sup>4</sup> *Loughran v. Ross*, 45 N. Y., 792.

<sup>5</sup> *Watriss v. First National Bank*, 124 Mass., 571.

<sup>6</sup> *Hedderich v. Smith*, 103 Ind., 203.

<sup>7</sup> *Stockwell v. Marks*, 17 Me., 455.

<sup>8</sup> *Ibid.*

may be sold by him, as also under execution for his debts;<sup>1</sup> and likewise as to emblements.<sup>2</sup>

Chattels vegetable consist, as their name imports, of movable articles of a vegetable origin, such as timber, underwood, corn and fruit. All these articles, so long as they remain unsevered from the land, are for many purposes considered as part of it; and they will pass by a conveyance or devise of the land without express mention.<sup>3</sup> If, however, the trees should be expressly excepted out of the conveyance, they will remain the personal property of the grantor, although severed only in contemplation of law;<sup>4</sup> and, in like manner, the trees alone may be granted by a tenant in fee simple, and they will then form the personal property of the grantee, even before they are cut down.<sup>5</sup> But if a tenant of lands in fee simple should die without having sold or devised them,<sup>6</sup> the law then draws a distinction between such vegetable products as are the annual results of agricultural labor, and such as are not. The former class are called by the name of *emblements*, and the right to reap them belongs to the executor or administrator of the deceased in exclusion of the heir;<sup>7</sup> whilst the latter class descend to the heir along with the land. The reason of the distinction appears to be, that as annual crops are mainly the result of labor incurred at the expense of the owner's personal estate, his personal estate ought to reap the benefit of the crop which results.<sup>8</sup> Accordingly crops of corn, and grain of all kinds, flax, hemp, and everything yielding an artificial annual profit produced by labor, belong to the executor or administrator, as against the heir; whilst timber, fruit trees, grass and clover, which do not repay within the year the labor by which they are produced, belong to the heir as part of the

<sup>1</sup> Doty v. Gersham, 5 Pick., 487; Gray v. Holdship, 17 S. & R., 413; Hey v. Bruner, 61 Pa. St., 87.

<sup>2</sup> Stambaugh v. Yeates, 2 Rawle, 161; Craddock v. Riddlesbarger, 2 Dana, 205; Whipple v. Fort, 2 Johns., 418; Penballow v. Dwight, 7 Mass., 34; Shannon v. Jones, 12 Ired., 206; Mitchell v. Billingsley, 17 Ala., 391.

<sup>3</sup> Com. Dig. tit. Biens (H).

<sup>4</sup> Herlakenden's Case, 4 Rep., 63 b.

<sup>5</sup> Wentworth's Office of an Executor, 14th ed., 148; Williams on Executors, pt. 2, bk. 2, c. 2, s. 2.

<sup>6</sup> As to a devisee, see Rudge v. Winnall, 12 Beav., 357; Cooper v. Woolfit, 2 Hurl. & Norm., 122.

<sup>7</sup> Com. Dig. tit. Biens (G).

<sup>8</sup> Wentworth's Office of an Executor, 14th ed., 147.

land.<sup>1</sup> The right to emblements also belongs to the executor or administrator of a tenant for life,<sup>2</sup> and to a tenant at will if dismissed from his tenancy before harvest.<sup>3</sup>

Emblements, so called from the Norman French *emblem*, to sow, may be defined as the right of tenants, or their personal representatives, whose terms have unexpectedly determined otherwise than by their own fault, to such crops, produced by the annual industry of man, as were sown or planted prior to such determination. Crops, in this connection, are divided into *fructus naturales*, or those which require to be planted but once and then bear for years, as apples, grasses, clover and the like, and *fructus industriales*, which are crops produced by the annual industry of man, and which ordinarily repay the labor by which they are produced within the year in which that labor is bestowed, as corn, potatoes, tobacco, cotton, etc. It is only to the latter class, *fructus industriales*, that the right of emblements attaches. Thus a tenant *pur autre vie*, whose *cestui que vie* died after the planting of a crop of clover, was held not entitled to the clover, that being a crop which, planted in April or May of one year, does not produce its first crop before June of the year following, and, therefore, one which does not ordinarily repay the labor expended to produce it within the year in which that labor is bestowed.<sup>4</sup> Hops, however, may be the subject of this right, inasmuch as, though producing successive crops from one set of roots, each crop requires the annual industry of man in the making of hills and the setting of poles; and this annual labor and expense, without which the crop would not grow at all, the law regards as equivalent to the annual sowing or planting of other vegetables.<sup>5</sup>

The tenant's estate must have been of uncertain duration, and

<sup>1</sup> See *Graves v. Weld*, 5 B. & Ad., 105 (27 E. C. L.); s. c., 2 Nev. & Man., 725.

<sup>2</sup> *Williams' Real Property*, 24, 2d ed.; 25, 3d and 4th eds.; 27, 5th, 6th, 7th and 8th eds.; 6th Am. ed., 29.

<sup>3</sup> *Ibid.*, 310, 2d ed.; 325, 4th ed.; 336, 5th ed.; 353, 6th ed.; 360, 7th ed.; 376 8th ed.; 6th Am. ed., 307.

<sup>4</sup> *Graves v. Weld*, 5 B. & Ad., 105 (27 E. C. L.).

<sup>5</sup> See *Rodwell v. Philips*, 9 M. & W., 503. Upon the foregoing propositions, generally, see *Evans v. Roberts*, 5 B. & C., 829, 836 (11 E. C. L.); *Jones v. Flint*, 10 A. & E., 753 (37 E. C. L.); *Washb. on Real Prop.*, 101-106; *Hawkins v. Skeggs*, 10 Humph., 31; *Sherburne v. Jones*, 20 Me., 70; *Weem's Ex. v. Bryan*, 21 Ala., 303; *Davis v. Brockenband*, 9 N. H., 73.

must have terminated without his fault; a tenant for years, therefore, who knew when he sowed that his term would expire before harvest, is not entitled to emblements, nor is a tenant for life or at will who forfeits or terminates his term by his own act or misconduct.<sup>1</sup> But where the lessor of the tenant for years was a life-tenant, and died during the term, the tenant was held entitled to emblements.<sup>2</sup> As between the heir and the personal representatives of the deceased owner, growing crops go to the latter, *supra*, p. 25; but, as between personal representatives and devisee, vendor and vendee, or mortgagor and mortgagee, they are part of the realty.<sup>3</sup>

The tenant of a mortgagor, whose lease is subsequent to the mortgage, is not entitled to emblements in case the mortgage should be foreclosed before the crops are severed.<sup>4</sup> *Aliter* if, after the sale under the mortgage, the purchaser allows the mortgagor or his tenant to remain in possession for several months and plant crops;<sup>5</sup> but the mortgagor's tenant is entitled as against the purchaser, at an execution sale, under a judgment rendered prior to the planting.<sup>6</sup>

By custom in some parts of England, as also in Pennsylvania, New Jersey and Delaware, the tenant, though his term was certain, is entitled to his "way-going crop," *i.e.*, such annual crops as were planted by him in the autumn during his term (but not in the spring), and not harvestable until after its termination.<sup>7</sup> This right to "way-going crops," however, rests entirely upon local customs, and is quite distinct from the right to emblements.

Tenants by sufferance, and wrongful occupants, are not entitled to emblements.<sup>8</sup> The personal representatives of tenants by the

<sup>1</sup> *Davies v. Connop*, 1 Price, 53; *Razor v. Qualls*, 4 Blackf., 286; *Harris v. Carson*, 7 Leigh, 632; *Kitteridge v. Woods*, 3 N. H., 504; *Whitmarsh v. Cutting*, 10 Johns., 360.

<sup>2</sup> *Bevans v. Briscoe*, 4 H. & J., 139.

<sup>3</sup> *Spence's Case*, Winch, 51; *Cooper v. Woolfit*, 2 H. & N., 122; *Hill on Fixt.*, n. 60; *Budd v. Hiles*, 3 Dutch., 43; *Shafner v. Shafner*, 5 Sneed, 94. *Semb.*, *contra*, as between devisor and devisee, *Evans v. Iglehart*, 6 G. & J., 188.

<sup>4</sup> *Wash. on Real Prop.*, 106, and citations; *Schouler on Pers. Prop.*, s. 109 and citations.

<sup>5</sup> *Allen v. Carpenter*, 15 Mich., 38.

<sup>6</sup> *Ibid.*; *Bittinger v. Baker*, 29 Pa. St., 66.

<sup>7</sup> *Denis v. Bossler*, 1 Pa. St., 224; *Howell v. Schenck*, 4 Zab., 89; *Borrell v. Dewart*, 37 Pa. St., 134; *Templeman v. Biddle*, 1 Harring., 522. See, also, *Deaver v. Rice*, 4 Dev. & Bat., 431; *Dorsey v. Eagle*, 7 G. & J., 321.

<sup>8</sup> *Doe v. Turner*, 7 M. & W., 226; *Rowell v. Klein*, 44 Ind., 290; *Boyer v. Williams*, 5 Mo., 335.

courtesy at common law,<sup>1</sup> and those of dowresses by the Statute of Merton,<sup>2</sup> are entitled to emblements.

The rights of the tenant or his representatives entitled to emblements are simply those of "entry, egress and regress," to cultivate the crop, and to harvest and take it away when fit for the purpose; the heir or reversioner is entitled to possession of the land, but is liable if he injures the crop, or refuses this right of free entry, egress and regress.<sup>3</sup>

Finally, no better summary of the law of emblements can be given, within the same compass, than that of Littleton and Coke, the former written as far back as the year 1481. Says Littleton: "If the lessee soweth the land, and the lessor, after it is sowne and before the corne is ripe, put him out, yet the lessee shall have the corne, and shall have free entry, egress and regress to cut and carry away the corne, because he knew not at what time the lessor would enter upon him." Upon this, Lord Coke, in Coke upon Littleton, 55 a., says: "The reason of this is, for that the estate of the lessee is uncertaine, and, therefore, lest the ground should be unmanured, which should be hurtful to the commonwealth, he shall reap the crop which he sowed in peace, albeit the lessor doth determine his will before it be ripe. And so it is if he set rootes or sow hempe or flax, or any other annuall profit, if, *after the same be planted*, the lessor oust the lessee, or if the lessee dieth, yet he or his executor shall have that yeare's crop. But if he plant young fruit trees, or young oaks, ashes, elms, etc., or sow the ground with acornes, etc., there the lessor may put him out notwithstanding, because they will yield no present annuall profit."

When lands are let to a tenant for years or for life, if no exception is made of the timber, the property in the timber will still remain in the owner of the inheritance, subject to the tenant's right to have the mast and fruit growing upon it, and the loppings for fuel, and the benefit of the shade for his cattle.<sup>4</sup> Accordingly all fruit which may be plucked, or bushes or trees, not being timber, which may be cut or blown down, will belong to the tenant,<sup>5</sup> but

<sup>1</sup> 1 Wms. Ex'rs, 719.

<sup>2</sup> 20 Hen. III, c. 2.

<sup>3</sup> 1 Wash. Real Prop., 105. Whether the party entitled to emblements is liable for rent for the period between the determination of the estate and harvest, *quere*, *Ibid*.

<sup>4</sup> Liford's Case, 11 Rep., 48 b.

<sup>5</sup> Channon v. Patch, 5 Barn. & Cress., 897 (11 E. C. L.), s. c., 8 Dow. & Ry.,

timber trees, which may be cut or blown down, will immediately become the property of the owner of the first estate of inheritance in the land, whether in fee simple or in tail.<sup>1</sup> Timber trees are oak, ash and elm in all places; and in some particular parts of the country, by local custom, where other trees are generally used for building, they are for that reason considered as timber.<sup>2</sup> But if the tenant should be a tenant *without impeachment of waste* (*sine impetitione vasti*), timber cut down by him in a husbandlike manner will become his own property when actually severed,<sup>3</sup> but not before;<sup>4</sup> for the words "without impeachment of waste" imply a release of all *demands* in respect of any waste which may be committed.<sup>5</sup> If, however, the words should be merely *without being impleaded for waste*, the property in the trees when cut would still remain in the landlord, and the action only would be discharged, which he might otherwise have maintained against the tenant for the waste committed by the act of felling the timber.<sup>6</sup>

Animals *feræ naturæ*, or wild animals, including game, are exceptions from the rules which relate to other movables, on the ground that until they are caught there is no property in them. If, therefore, the owner of land in fee simple should die, the game on his land, or the fish in any river or pond upon the land, will not belong to his executor or administrator.<sup>7</sup> And if a man should have a park or warren, he has no true property in the deer, conies, pheasants or partridges; but they belong to him only "*ratione privilegii* for his game and pleasure so long as they remain in the privileged place."<sup>8</sup> But a property in wild animals may be obtained by reclaiming or catching them (*propter industriam*), or by

651; *Berriman v. Peacock*, 9 Bing., 384 (23 E. C. L.); s. c., 2 Moo. & Scott, 524; *Pidgley v. Rawling*, 2 Coll., 275.

<sup>1</sup> *Herlakenden's Case*, 4 Rep., 63 a.; *Whitfield v. Beawit*, 2 P. Wms., 240; *Bewick v. Whitfield*, 3 P. Wms., 268; *Lushington v. Boldero*, 15 Beav., 1. See, however, *Earl Cowley v. Wellesley*, M. R., 1 Law Rep. Eq., 656, *query*.

<sup>2</sup> 2 Black. Com., 281.

<sup>3</sup> *Lewis Bowles' Case*, 11 Rep., 82 b. See *Williams' Real Property*, 23, 2d ed.; 24, 3d & 4th eds.; 25, 5th, 6th, 7th & 8th eds; 6th Am. ed., 28, 29.

<sup>4</sup> *Cholmeley v. Paxton*, 3 Bing., 207 (11 E. C. L.); *Cockerell v. Cholmeley*, 10 Barn. & Cress., 564 (21 E. C. L.).

<sup>5</sup> *Lewis Bowles' Case*, 11 Rep., 82 b. <sup>6</sup> *Walter Idle's Case*, 11 Rep., 83 a.

<sup>7</sup> Co. Litt., 8 a.; *The Case of Swans*, 7 Rep., 17 b.

<sup>8</sup> 7 Rep., 17 b; Year Book 4 Hen. VI., 55 b, 56 a; F. N. B., 87 n. (a).



reason of their being unable to get away (*propter impotentiam*).<sup>1</sup> Thus deer, even though in a legal park, may be so tame and reclaimed as to pass to the executors of the owner of the park on his decease;<sup>2</sup> so rabbits in a hutch, fish in a box, and young pigeons in a dove-house, unable to fly, will belong to the executor or administrator of the owner, and not to his heir. It appears formerly to have been thought that hawks and hounds were not subjects of personal property, but would descend with the lands to the heir; but this opinion is not now law. "For," observes the author of the Office of an Executor,<sup>3</sup> "although they be for the most part but things of pleasure, *that* hindereth not but they may be valuable as well as instruments of music, both tending to delight and exhilarate the spirits; a cry of hounds hath to my sense more spirit and vivacity than any other music."

Things animate are divided into animals *naturæ domitæ*, or those which are usually found in a domesticated state, and animals *feræ naturæ*, or wild in their nature and habits; the former being the subjects of absolute property, while property in the latter is of a qualified nature, lasting only so long as such animals are in the actual or constructive possession of him who has captured or reclaimed them, or upon whose lands they are without power to remove themselves—title *per industriam*, and *per impotentiam*.<sup>4</sup> Title *per privilegium*, that is, the privilege possessed by certain classes of persons to the exclusion of others to hunt game, which obtains in some countries, does not exist in any of the American States.

Animals *feræ naturæ*, therefore, are the property of the first taker, so long as they remain actually or constructively in his possession. But possession of them can only be acquired by actual or complete deprivation of their natural liberty; pursuing, wounding, or being on the point of seizing, confers no rights as against another who first actually kills, captures or causes to escape.<sup>5</sup> But a custom that whales belong to the ship whose crew first strike them, though

<sup>1</sup> Black. Com., 391, 394; Williams on Executors, pt. 2, bk. 2, c. 2, s. 1.

<sup>2</sup> Morgan v. The Earl of Abergavenny, 8 C. B., 678 (65 E. C. L.).

<sup>3</sup> Wentworth's Office of an Executor, 143, 14th ed. The author of this work is supposed to have been Mr. Justice Doddridge.

<sup>4</sup> Bl. Com., Book 2, 389, *et seq.*

<sup>5</sup> Young v. Hichens, 6 A. & E., N. S., 606 (51 E. C. L.); Pierson v. Post, 3 Caines, 175; Buster v. Newkirk, 20 Johns., 75.

killed by the crew of another ship, is valid and will prevail.<sup>1</sup> Whales killed, anchored and left in the sea with marks of appropriation belong to the captors.<sup>2</sup> So oysters planted in a bay or arm of the sea, clearly designated, belong to the individual planting, who may maintain trespass if his rights are infringed.<sup>3</sup>

Animals *feræ naturæ* being subjects of qualified property only, the wrongful taking of them is not, except in the case of such as are good for food, larceny, nor criminally punishable; though a civil action will lie for invasion of the owner's rights.<sup>4</sup> Animals which are neither fit for food nor useful for husbandry, though they may be domesticated, are nevertheless, in legal contemplation, *feræ naturæ*, as cats, dogs, singing birds, etc.<sup>5</sup>

As the taking of animals *feræ naturæ*, not good for food, is not indictable, words charging one with stealing such animals are not actionable *per se*.<sup>6</sup> But a conviction of larceny for stealing a swarm of bees has been sustained.<sup>7</sup> On the other hand, in *Warner v. The State*,<sup>8</sup> it was held that raccoons can not be the subjects of larceny or felonious taking; and, in Pennsylvania, it seems to be held that taking a swarm of wild bees, and their honey also, from the land of another, although the latter knew of their presence and had confined them so that they could not escape, is not larceny, nor violation of any right.<sup>9</sup> But, by the weight of authority, wild bees in a bee-tree belong to the owner of the land, and not to the finder.<sup>10</sup>

Owners of domestic animals are not liable for injuries inflicted by them, except upon proof of notice or knowledge of their dangerous or mischievous propensities.<sup>11</sup> With such notice, the owner is absolutely liable, and cannot excuse on the ground that the ani-

<sup>1</sup> *Swift v. Gifford*, 2 Low (U. S. Dist. Ct.), 110.

<sup>2</sup> *Taber v. Jenny*, 1 Sprague, 315.

<sup>3</sup> *Fleet v. Hegeman*, 14 Wend., 42; and see *Decker v. Fisher*, 4 Barb., 592; *Lowndes v. Dickerson*, 34 Barb., 586; *State v. Taylor*, 3 Dutch., 117; *Arnold v. Mundy*, 1 Holst., 1.

<sup>4</sup> 2 Bl. Com., 393.

<sup>5</sup> *Ibid.*, 390, 393.

<sup>6</sup> *Norton v. Ladd*, 5 N. H., 203.

<sup>7</sup> *State v. Murphy*, 8 Blackf., 498.

<sup>8</sup> 1 Greene, Iowa, 106.

<sup>9</sup> *Wallis v. Mease*, 3 Binn., 547.

<sup>10</sup> *Ferguson v. Miller*, 1 Cow., 243; *Adams v. Burton*, 43 Vt., 36; *Idol v. Jones*, 2 Dev., Law (N. C.), 162.

<sup>11</sup> *Vrooman v. Lawyer*, 13 Johns., 349; *Spring Co. v. Edgar*, 99 U. S., 645; *Lyke v. Van Leuven*, 4 Denio, 127; *Van Leuven v. Lyke*, 1 N. Y., 515; *Tift v. Tift*, 4 Denio, 175.

mal was usually harmless.<sup>1</sup> And the keeper of a wild or savage animal is liable without notice, if he allows it to run loose.<sup>2</sup> Dogs attacking persons may be killed, and so as to dogs attacking and killing fowls or domestic animals on the owner's land; *aliter*, if only worrying cattle, without endangering them.<sup>3</sup> So, killing a ferocious dog at large is justifiable.<sup>4</sup> And so one disturbed at night and by day by howling and barking dogs may kill, on his own premises, where such annoyance cannot be otherwise prevented.<sup>5</sup> Trespassing chickens may not be killed.<sup>6</sup> The liability of the owners of animals for injuries caused by them, stands wholly on the ground of actual or presumed negligence.<sup>7</sup>

<sup>1</sup> Buckley v. Leonard, 4 Denio, 500; See, also, May v. Burdett, 9 A. & E., N. S., 101 (58 E. C. L.); Jackson v. Smithson, 15 M. & W., 563; Card v. Case, 5 M. & Gr. & Scott, 622 (57 E. C. L.); Popplewell v. Pierce, 10 Cush., 509.

<sup>2</sup> Spring Co. v. Edgar, 99 U. S., 645.

<sup>3</sup> Hinckley v. Emerson, 4 Cow., 351.

<sup>4</sup> Putman v. Payne, 13 Johns., 312.

<sup>5</sup> Brill v. Flagler, 23 Wend., 354.

<sup>6</sup> Clark v. Keliber, 107 Mass., 406.

<sup>7</sup> Lyons v. Merrick, 105 Mass., 71, 76. But see, May v. Burdett, Jackson v. Smithson, Card v. Case and Popplewell v. Pierce, *supra*, holding allegation of negligence wholly unnecessary.

## CHAPTER II.

### OF TROVER, BAILMENT AND LIEN.

HAVING now considered those movable articles of property which form exceptions to the rules by which chattels personal are in general governed, let us proceed to notice some circumstances in which chattels personal may be placed, so as to form, not real, but apparent, exceptions to the primary rule already noticed,<sup>1</sup> that personal property is essentially the subject of absolute ownership, and cannot be held for any *estate*. The property in goods can only belong to, or be vested in, one person at one time; in this respect it resembles the seisin or feudal possession of lands.<sup>2</sup> Lands, however, may be so conveyed that several persons may possess in them, at the same time, several distinct vested *estates* of freehold, one of them being in possession, and the others in remainder, or the last perhaps being in reversion.<sup>3</sup> But the law knows no such thing as a remainder or reversion of a chattel. It recognizes only the simple *property* in goods, coupled or not with the right of immediate possession. This simple principle of law, if carefully borne in mind, will serve to explain many points which would otherwise appear difficult or even contradictory. It must be remembered, however, that it does not strictly apply to the movable articles noticed in our first chapter, which, from their connection with the land, are often governed by the principles of real property, rather than those of personal.

[The author's effort, throughout this work, to deny the possibility of estates, remainders and reversions in personal property, is out of harmony with the tendency of the law for at least two centuries past. It is true that the doctrines relating to personal property,

<sup>1</sup> *Ante*, pp. 11-12.

<sup>2</sup> See Williams' Real Property, 111, 2d ed.; 113, 3d & 4th eds.; 121, 122, 5th ed.; 127, 128, 6th ed.; 130, 131, 7th ed.; 136, 8th ed.; 6th Am. ed., 114, 115.

<sup>3</sup> *Ibid.* p., 198, 2d ed.; 206, 4th ed.; 215, 5th ed.; 225, 6th ed.; 234, 7th ed.; 241 8th ed.; 6th Am. ed., 203, 204.

though not free from "a certain feudal tincture,"<sup>1</sup> were not derived from the feudal system to which the doctrine of estates in real property is generally referred; as also that, by the rules of the ancient common law, formed when personal property was insignificant in amount and importance, there could be no expectant estates in chattels,<sup>2</sup> so that a gift of a horse to A. for life, with remainder to B., vested the absolute property in A.

But, in the first place, at the present time, when, if not in Europe, certainly in many of our States by statute, in others by express adjudication, and in all of them in practical effect, "every real vestige of tenure is annihilated,"<sup>3</sup> and a man "no more holds his land by that tenure than he does his horse,"<sup>4</sup> estates in land are as fully recognized, and as essential to accommodate the policy, purposes and uses of the age, as when the feudal system was in full vigor. And, in the second place, the rule of the common law which forbade the creation of particular estates and remainders in chattels began to be relaxed as far back as the time of Lord Coke,<sup>5</sup> and, when Blackstone wrote, was so far abolished that not only the *use* of a chattel might be limited by *will*, which was the first relaxation, but, in the language of that writer, "if a man, either by deed or will, limits his books or furniture to A., for life, with remainder over to B., this remainder is good."<sup>6</sup> "The rule that a remainder may be limited, after a life estate in personal property, is as well settled as any other principle of our law."<sup>7</sup>

It has been said that estates in expectancy in chattels can be created only by will or trust deeds, and not by the ordinary forms of conveyance.<sup>8</sup> But, while the old common law rule prohibiting such estates was first relaxed in favor of wills and trust settlements only, the relaxation seems now to be general.<sup>9</sup>

With respect to the creation of expectant estates in them, chattels are divided into two classes, namely: those susceptible of use otherwise than by consumption, as money, plate, stocks, horses,

<sup>1</sup> 2 Bl. Com., 386.

<sup>2</sup> 2 Bl. Com., 398.

<sup>3</sup> 4 Kent Com., 25; 3 *Ibid.*, 510, 513; See 1 Washb. Real Prop., pp., 39 *et seq.*

<sup>4</sup> Van Rensselaer v. Smith, 27 Barb., 104, 157.

<sup>5</sup> Manning's Case, 8 Co., 94 b.

<sup>6</sup> 2 Bl. Com., 398; 2 Kent Com., 352.

<sup>7</sup> Smith v. Bell, 6 Pet., 68; and see *infra*.

<sup>8</sup> Betty v. Moore, 1 Dana, 235; Morrow v. Williams, 3 Dev., 263.

<sup>9</sup> 2 Bl. Com., 398; Powell v. Brown, 1 Bailey, 100.

cattle, and the like, and those whose only use lies in consumption. It is only the former class, ordinarily, in which such estates can be created; a gift of chattels *quæ ipso usu consumuntur*, specifically naming them, to one for life, with remainder over, vesting the absolute property in the first taker.<sup>1</sup> But if such chattels are not specifically named, as where they are included in the residuary clause of a will, or under some general term, the first taker must convert them into money, use only the interest, and reserve the principal for the remainderman.<sup>2</sup> A lease, so given, must be sold, the life-tenant taking only the interest on the proceeds of sale.<sup>3</sup> Where the gift is money, the life-tenant is not entitled to possession of the fund, but only to interest upon it.<sup>4</sup>

Formerly, the remainderman was entitled to demand security that the property should be forthcoming; but now such security can only be required on proof of actual danger of loss.<sup>5</sup> An inventory may still be required.<sup>6</sup>

1. When the property in goods is coupled with the possession of them, the ownership is, of course, complete. This is the common and usual case of the ownership of chattels personal: the owner knows that the goods are his own, and in his own possession, and that is sufficient for him. Circumstances may, however, arise to change this state of things. An article may be lost. In this case the owner still retains his property in the thing, but he has lost possession of it. The property, however, which still remains in him, entitles him to the possession of the article, whenever he can meet with it; or, in legal phraseology, the property draws with it the right of possession.<sup>7</sup> If, therefore, another person should find the article lost, he will have no right to convert it to his own use, if he has any means of knowing to whom it belonged, but must, on demand, deliver it up to the rightful owner, in whom the property is already vested.

<sup>1</sup> Porter v. Tournay, 3 Ves., 311; Randall v. Russell, 3 Meriv., 194; Smith v. Bell, 6 Pet., 68, 80; Evans v. Iglehart, 6 G. & J., 172, 197; Tyson v. Blake, 22 N. Y., 558; Shaw v. Huzzey, 41 Me., 495; German v. German, 27 Pa. St., 116; Henderson v. Vaulx, 10 Yerg., 30.

<sup>2</sup> Perry on Trusts, s. 547 and citations. See the authorities last cited.

<sup>3</sup> Minot v. Thompson, 106 Mass., 583.

<sup>4</sup> Clark v. Clark, 8 Paige, 152.

<sup>5</sup> Foley v. Burnell, 1 Bro. C. C., 279; Homer v. Shelton, 2 Met., 194; Langworthy v. Chadwick, 13 Conn., 42; 2 Kent Com., 354.

<sup>6</sup> Ibid.

<sup>7</sup> 2 Wms. Saunders, 47 a.

If he should refuse to do so, such refusal will argue that he claims it as his own, and will accordingly be evidence of a conversion of the thing to his own use.<sup>1</sup> For the wrong or *trespass* thus committed, a specific remedy has been provided by the law, in the shape of an action of *trover and conversion*, or more shortly an action of *trover*, which is one of those actions comprised within the technical class of *trespass on the case*. The word *trover* is from the French *trouver*, to find; and the word *conversion* is added, from the conversion of the goods to the use of the defendant being the gist of the action thus brought against him. That the defendant should have found the article lost is not his fault, but his conversion of it to his own use is a trespass and renders him liable to the action we are now considering. This action accordingly is now constantly brought to recover damages for withholding the possession of goods whenever they have been wrongfully converted by the defendant to his own use, without regard to the means, whether by finding or otherwise, by which the defendant may have become possessed.<sup>2</sup> This action can be maintained only when the plaintiff has been in possession of the goods,<sup>3</sup> or has such a property in them as draws to it the right to the possession. If the goods have been wrongfully converted by the defendant to his own use, the plaintiff will succeed, if he should prove either way his own right to the immediate possession of the goods;<sup>4</sup> if he should not prove such right, he will fail.<sup>5</sup> The property in the goods is that which most usually draws to it the right of possession; and the right to maintain an action of *trover* is therefore often said to depend on the plaintiff's *property* in the goods; the right of immediate possession is also itself sometimes called a special kind of property;<sup>6</sup> but these expressions should not mislead the student. The action of

<sup>1</sup> *Ibid.*, 47 e; *Agar v. Lisle*, Hob., 187; Bac. Abr. tit. *Trover* (B).

<sup>2</sup> 3 Black. Com., 153; stat. 15 & 16 Vict., c. 76, s. 49, sched. (B) 28.

<sup>3</sup> *Addison v. Round*, 4 Ad. & Ell., 799 (31 E. C. L.); s. c., 6 Nev. & Man. 422; *Brooke v. Mitchell*, 6 N. C., 349 (37 E. C. L.); s. c., 8 Scott, 739.

<sup>4</sup> *Wilbraham v. Snow*, 2 Saund., 47; *Armory v. Delamirie*, 1 Str., 505; S. C., Sm. L. C., 9th Am. ed., 631; *Roberts v. Wyatt*, 2 Taunt., 268; *Legg v. Evans*, 6 Mee. & W., 36; *Stephen on Pleading*, 354, 5th ed.

<sup>5</sup> *Gordon v. Harper*, 7 T. Rep., 9; *Ferguson v. Cristall*, 5 Bing., 335 (15 E. C. L.); *Leake v. Loveday*, 4 Man. & Gr., 972 (43 E. C. L.); *Bradle v. Copley*, 1 C. B., 685 (50 E. C. L.).

<sup>6</sup> *Rogers v. Kennay*, 9 Q. B., 592 (58 E. C. L.).

trover tries only the right to the immediate possession, which, as we shall now see, may exist apart from the *property* in the goods.

For let us suppose that the finder of the article lost, whilst ignorant of the true owner, should have been wrongfully deprived of it by a third person. In this case the owner being absent, the finder is evidently entitled to the possession of the thing; and he will accordingly succeed in an action of trover brought by him against the wrong-doer.<sup>1</sup> Here the property in the thing which was lost evidently belongs still to the original owner; but the right of possession is in the finder, until the owner makes his appearance. The owner's property then draws with it the right of possession; and should the finder convert the article found to his own use, he

<sup>1</sup> *Armory v. Delamirie*, 1 Str., 505; S. C., Smith's Leading Cases, 9th Am. ed., 631; *Bridges v. Hawkesworth*, 15 Jur., 1079. See *Buckley v. Gross*, 3 B. & S., 566 (113 E. C. L.); *Bourne v. Fosbrooke*, 18 C. B. N. S., 515 (114 E. C. L.)

The finder of a chattel has a special property in it, and may maintain trover against any one who shall convert it, except the true owner. But this rule does not apply to the finder of a chose in action, *e. g.*, a promissory note or lottery ticket: *McLaughlin v. Waite*, 9 Cowen, 670; see *Brandon v. Huntsville Bank*, 1 Stew., 320; *Boyle v. Roche*, 2 E. D. Smith, 335; and so of money in specie, or bank bills; *Graves v. Dudley*, 20 N. Y., 76; *Aurentz v. Porter*, 56 Pa. St., 115; though it is otherwise where the money can be identified, as specie on special deposit, or bank-bills by proof of denomination, letter, etc., *Chapman v. Cole*, 12 Gray (Mass.), 141; *Norton v. Kidder*, 54 Maine, 189. For the law on this subject, in regard to those securities known on the stock exchanges as bonds payable to bearer, with or without coupons for interest attached to them, see *ante*, p. 9, note.

The possession of a certificate given by the keeper of the public warehouse, that one is entitled to so many hogsheads of merchandise of such a weight and quality, in the warehouse, to be delivered to bearer, is evidence that the merchandise is in the defendant's possession, so as to support an action of trover for it, by one holding the certificate: *Hance v. McCormick*, 1 Cr. C. C., 522.

Possession, whether rightfully or wrongfully obtained, is a sufficient title in the plaintiff, as against a mere stranger or wrongdoer; *Knapp v. Winchester*, 11 Vt., 351; *Coffin v. Anderson*, 4 Blackf., 395; *Cook v. Patterson*, 35 Ala., 102; *Jeffries v. Great Western R. R. Co.*, 34 Eng. L. & Eq., 122. But not as against the real owner; *Sylvester v. Girard*, 4 Rawle, 185.

The finder of a chattel may maintain trover for it; *Clark v. Mallory*, 3 Harring., 68.

Trover may be maintained against a stranger, upon a mere prior possession obtained by a purchaser of chattels under a void execution; *Duncan v. Spear*, 11 Wend., 54. But where a chattel is converted by a bailee, who sells or leases it without authority, the bailor may maintain trover for it, even against a vendee or lessee in good faith and without notice: *Crocker v. Gullifer*, 44 Maine, 491. M. & W.



in his turn will be liable to an action of *trover* in respect of the owner's right of possession. Thus, so far as we have already proceeded, we have found nothing more than a simple property in goods, existing with or without the right of possession. The action of *trover* tries the right of possession, and may or may not determine the property. For, strange as it may appear, there is no action in the law of England by which the property either in goods or lands is alone decided.

2. But the article in question, instead of being lost and found, may become the subject of *bailment*. Bailment is defined by Sir William Jones, in his admirable and classical Treatise on the Law of Bailment,<sup>1</sup> to be a delivery of goods in trust, on a contract expressed or implied that the trusts shall be duly executed, and the goods redelivered as soon as the trust or use for which they were bailed shall have elapsed or be performed. The term *bailment* is derived from the French word *bailleur*, to deliver. The person who delivers the goods is called the bailor; the person to whom they are delivered the bailee. The trusts on which goods may be delivered are various. The principal are the following: They may merely be lent to a friend, or left in the custody of a warehouseman or wharfinger, or they may be entrusted to a carrier to convey to a distance, or to an agent or factor to sell; or they may be pawned for money lent, with or without a power to sell them,<sup>2</sup> or they may be let out to hire.<sup>3</sup> In all cases of bailment, however, the simple rule still holds, that the *property* in goods can belong to one party only; and when any goods are *bailed*, the property still remains in the bailor.<sup>4</sup>

[The above proposition of the learned author, that the property in goods can belong to one party only, is not sustained by *Franklin v. Neate*, the case cited, which simply holds that the pawnor of a chattel retains a *qualified* property in it, subject to the right existing in the pawnee, and that the pawnor may sell and transfer this qualified property remaining in him to a third person, entitling the latter to maintain *trover* against the pawnee, if the latter refuses to surrender the chattel on being tendered the amount of his debt.

<sup>1</sup> 117.

<sup>2</sup> See *Pigot v. Cubley*, 15 C. B. N. S., 701 (109 E. C. L.).

<sup>3</sup> See *Coggs v. Bernard*, 2 L. L. Raym., 909-912; s. c., *Smith's Leading Cases*, 9th Am. ed., 354.

<sup>4</sup> *Franklin v. Neate*, 13 M. & W., 481.

Nor is the proposition maintainable in principle. Property is the exclusive right to the use and enjoyment of things.<sup>1</sup> If A., the owner of a chattel, hires it to B. for one year, it is obvious that B. has the exclusive right to its use and enjoyment for that period, and, therefore, has a *property* in it; and yet, at the same time, in accordance with the rule declared in *Franklin v. Neate*,<sup>2</sup> the case cited, there remains a property in A. The complete ownership or property is divided between them, and there is a *qualified* property in each.<sup>3]</sup>

The possession of the goods, however, is evidently for the time being with the bailee. But if, while goods are in bailment, a third person should become possessed of them, and should wrongfully convert them to his own use, the right to recover possession will in some degree depend upon the nature of the bailment.

If the bailment should be what is called a *simple bailment*, as in the four first instances above mentioned, that is, a bailment which does not confer on the bailee a right to exclude the bailor from possession, in such a case either the bailee or the bailor may maintain an action of trover against the wrong-doer.<sup>4</sup> The bailee may maintain this action, because the action depends only on the right to possession which the bailee has by virtue of the bailment made to him;<sup>5</sup> and the bailor may also maintain the action, because his property in the goods draws with it the right of possession, and the bailment is not of such a kind as to vest this right in the bailee solely. The bailee is rather in the situation of servant to the bailor, and the possession of the one is equivalent in construction of law to the possession of the other. But as it would be unjust that the wrong-doer should pay damages twice over for his offence, the recovery of damages either by bailee or bailor deprives the

<sup>1</sup> See 2 Bl. Com., 388; Bouv. L. Dict., tit. *Property*.

<sup>2</sup> 13 M. & W., 481.

<sup>3</sup> 2 Bl. Com., 396. And see matter within brackets, *supra*, pp. 33-35.

<sup>4</sup> *Nicholls v. Bastard*, 2 C. M. & R., 659; *Manders v. Williams*, 4 Exch. Rep., 339.

A., of Liverpool, shipped goods, which, by the bill of lading, were to be delivered to D. or his assigns, in Philadelphia. The freight was payable in Liverpool, and it appeared that the goods were shipped on account of A. Held, that the bill of lading vested the property in B., who might maintain an action in his own name against the owner of the ship, for the negligent carriage of the goods; *Griffith v. Ingledew*, 6 S. & R., 429.—G. & W.

<sup>5</sup> *Sutton v. Buck*, 2 Taunt., 202.

other of his right of action.<sup>1</sup> If, however, the bailment should not be of the simple kind, but should confer on the bailee the right to exclude the bailor from the possession, here, though the property in the goods still remains in the bailor, the bailee alone can maintain an action of trover against any person who may have taken the goods and converted them to his own use. Thus the pawnee or hirer of goods can alone maintain an action of trover so long as the pawning or hiring continues.<sup>2</sup> Here again we have the property in the goods still vested in one person, the bailor, drawing with it, in the case of simple bailment, the right to the possession, and in the case of other bailments, temporarily disconnected from that right. If, however, any bailee, whatever be the nature of his bailment, should convert the goods bailed to him to his own use, he will by that act have determined the bailment: the property in the bailor will draw to it the right to immediate possession, and the bailor may accordingly recover damages for the act by an action of trover.<sup>3</sup>

3. The last case requiring notice in which goods may be in the possession of a person who has no property in them, is the case of the existence of a *lien* on the goods. A lien is the right of a person in possession of goods to retain them until a debt due to him has been satisfied.<sup>4</sup> A lien is either *particular* or *general*. A particular lien is a right to retain the particular goods in respect of which the debt arises. A general lien is a right to retain goods in respect of a general balance of an account. The former kind of lien is favored in law; but the latter, having a tendency to prefer one creditor above another, is taken strictly.<sup>5</sup> A particular lien is given by the common law over goods which a person is compelled to receive; thus carriers<sup>6</sup> and innkeepers<sup>7</sup> have a lien on the

<sup>1</sup> Bac. Abr. tit. Trover (C).

<sup>2</sup> Gordon v. Harper, 7 T. R., 9; Burton v. Hughes, 2 Bing., 173 (9 E. C. L.); Ferguson v. Cristall, 5 Bing., 305 (15 E. C. L.); Pain v. Whitaker, Ry. & Moo., 99.

<sup>3</sup> Cooper v. Willomatt, 1 C. B., 672; (50 E. C. L.); Johnson v. Stear, 15 C. B. N. S., 330 (109 E. C. L.); Pigot v. Cubley, 15 C. B. N. S., 701 (109 E. C. L.).

<sup>4</sup> Hammonds v. Barclay, 2 East, 235; Heywood, *Ex parte*, 2 Rose, 357; Smith's Compendium of Mercantile Law, 534, 5th ed.; 563, 6th ed.

<sup>5</sup> Houghton v. Matthews, 3 Bos. & Pul., 494.

<sup>6</sup> Skinner v. Upshaw, 2 Lord Raym., 752.

<sup>7</sup> Thomson v. Lacey, 3 B. & Ald., 283 (5 E. C. L.).

goods in their care; although an innkeeper cannot detain his guest's person, or take his coat off his back, to secure payment of his bill.<sup>1</sup> A particular lien is also given by law to every person who by his labor or skill has improved or altered an article intrusted to his care: thus a miller has a lien on the flour he has ground for the cost of grinding:<sup>2</sup> and a shipwright has a lien on a ship intrusted to him to repair for the costs of repairing it.<sup>3</sup> So a

<sup>1</sup> *Sunbolf v. Alford*, 3 M. & W., 248. The lien of innkeepers on the goods of their guests is now regulated by stat. 26 & 27 Vict., c. 41.

<sup>2</sup> *Ex parte Ockenden*, 1 Atk., 235.

<sup>3</sup> *Franklin v. Hosier*, 4 B. & Ald., 341 (6 E. C. L.).

By the civil law, and the general admiralty law, material-men have a lien upon the vessel: Domat's Civil Law, book 3, tit. 1, sec. 5.

But by the common law of England, which is binding on the Admiralty Court, those who build, repair or supply a domestic vessel have no lien upon the vessel herself, except the common law lien of the mechanic, arising from his mere possession, and only coextensive with such possession: *Franklin v. Hosier*, 4 B. & A., 341 (6 E. C. L.); *The Neptune*, Cumberlege, 3 Harr., 136, 139; *Bland*, *Ex parte*, 2 Rose, 91; *The Harmonie*, 1 W. Rob., 178; *Raitt v. Mitchell*, 4 Camp. R., 146; *The Brownina*, 1 Dodson, 235; *The Alexander*, *Ibid.*, 280; *The Zodiac*, 1 Harr., 325; *The Vibilia*, 1 W. Rob., 6; *Buxton v. Snee*, 1 Vesey, 154; *Hoare v. Clement*, 2 Show., 338.

But under the general admiralty law in England, this country, and elsewhere, mechanics, material-men, and others, doing work on, or furnishing materials or supplies for, a foreign vessel, have a lien on such vessel, without any limit as to its duration in point of time: *Justin v. Ballam*, Salk., 34; *Ex parte Shank* and others, 1 Atk., 234; *Wilkins v. Carmichael*, 1 Doug., 101; *Wilkinson v. Bernardiston*, 2 Wms., 367; *Ex parte Halkett*, 3 Ves. & B., 135; S. C., 2 Rose, 194, 229; *The ship Fortitude*, 3 Sumner, 228; *The Brig Nestor*, 1 *Ibid.*, 74, 79; *The Schooner Marion*, 1 Story C. C., 68; *Reed v. The Hull of a New Brig*, *Ibid.*, 246; *Buddington v. Stewart*, 14 Conn., 404; *Davis v. A New Brig*, 1 Gilpin, 473; *The General Smith*, 4 Wheat., 438; *Shrewsbury v. The Sloop Two Friends*, Bee's Adm., 433; *Gardner v. The Ship New Jersey*, 1 Peters' Adm., 22, 23; *The Jerusalem*, 2 Gallas., 345; *The Young Mechanic*, 2 Curtis C. C., 404; *Monsoon*, Sprague's Decs., 37; *Perkins v. Pike*, 42 Maine, 141; *The Active*, Olcott Adm., 271; *The Tackle*, etc., of the *America*, 1 Newb. Adm., 195; and liens existing by the maritime law of foreign jurisdictions can be enforced here, though all parties are foreigners: *The Maggie Hammond*, 9 Wall., U. S., 435. Whether a vessel is domestic or foreign depends upon the residence of her owners: *The Golden Gate*, 1 Newb. Adm., 308; and vessels belonging to one State, when in the ports of another, are deemed foreign: *The Chusan*, Sprague's Decs., 39. Although there is no fixed time within which this lien must be enforced, yet it may be lost by negligence or delay, and when the rights of third parties are compromised, courts of admiralty will require vigilance in parties who seek their aid, and will not sit to enforce stale and dormant claims: *The Eastern Star*, Ware, 186, 212; *Packard v. The Louisa*, 2 Wood. & M., 48; *The Mary*, 1 Paine, 180; *The Margaret*, 3 Harr., 238; *The*

lien may be claimed for training a horse, because he is improved by the labor and skill thus bestowed upon him;<sup>1</sup> but no lien can arise merely for his keep,<sup>2</sup> unless he has been kept by an innkeeper, who is compelled to take him in.<sup>3</sup> A lien on goods is not sufficient to warrant the sale of them,<sup>4</sup> nor does it authorize the possessor to charge for their standing.<sup>5</sup> A particular lien also arises in the case of salvage, or rescuing a ship or its lading from the perils of the sea or the queen's enemies, for the trouble and risk incurred.<sup>6</sup>

A general lien, when it does not arise by express contract, or from a contract implied by the course of dealing between the parties,<sup>7</sup> accrues in consequence of the custom of some trade or profession; and it may be local also, that is, confined to some particular place.<sup>8</sup> It obtains in many trades, such as wharfingers,<sup>9</sup> dyers,<sup>10</sup> calico

Nestor, 1 Sumner, 71; *Ex parte Foster*, 2 Story, 145; *The Rebecca*, Ware, 212; *Lillie Mills*, Sprague's Decs., 307.

The regular sale of such property, under a decree of the court, gives a good title against all the world, and where the property was affected by a lien, the proceeds are still affected by it in whosoever hands they may be: *Benedict's Adm.*, 309; *Gilpin*, 189, 549; *Gardner v. The Ship New Jersey*, 1 Peters' Adm., 223; *The John*, 3 Rob., 288; and so of a sale made in good faith by the master in a foreign port, and with a necessity for it: *The Amelia*, 6 Wall., U. S., 18. But it has been held that the sale of a steamboat by the order of court in Illinois, would not prevent a citizen of Missouri from enforcing against the boat in the hands of the purchaser his lien created by the laws of Missouri: *Phegley v. David Tatum*, 33 Mo., 461. Captures *jure belli*, however, override all previous liens; *The Battle*, 6 Wall., U S., 498.

In many of the States of this country, mechanics and material-men have by positive statutory enactment, a lien on domestic vessels for work done on or materials furnished for such vessel. G. & W.

<sup>1</sup> *Bevan v. Walters*, 1 Moo. & Mal., 236.

<sup>2</sup> *Wallace v. Woodgate*, 1 Ry. & Moo., 293. See *Sanderson v. Bell*, 2 Crompt. & Mee., 304, 311; 4 Tyr., 244, 252.

<sup>3</sup> *Johnson v. Hill*, 3 Stark., 172 (3 E. C. L.); *Allen v. Smith*, 12 C. B. N. S., 638 (104 E. C. L.); affirmed in Ex. Ch., 9 Jur., N. S., 1284, 11 W. R., 440.

<sup>4</sup> *Thames Iron Works Company v. Patent Derrick Company*, 1 John. & H., 93.

<sup>5</sup> *British Empire Shipping Company v. Simes*, 1 E. B. & E. 353 (96 E. C. L.).

<sup>6</sup> *Hartford v. Jones*, 1 Lord Raym., 393; *Baring v. Day*, 8 East, 57.

<sup>7</sup> *Simond v. Hibbert*, 1 Rus. & Myl., 719.

<sup>8</sup> *Holderness v. Collinson*, 7 B. & C., 212 (14 E. C. L.).

<sup>9</sup> *Naylor v. Mangles*, 1 Esp., 109.

<sup>10</sup> *Savill v. Barchard*, 4 Esp. 53. See, however, *Close v. Waterhouse*, 6 East, 523, n

printers,<sup>1</sup> factors,<sup>2</sup> policy brokers,<sup>3</sup> and bankers,<sup>4</sup> and perhaps, also, common carriers.<sup>5</sup> Solicitors and attorneys have also a lien on all the deeds and documents of their clients in their possession for their professional charges generally;<sup>6</sup> but this doctrine is to be taken in connection with the peculiar nature of title deeds, which, being the sinews of the land, follow the seisin of it, and may therefore be held by the client only for a limited interest. Thus, if a tenant for life should leave the title deeds of the land in the hands of his solicitor, the lien of the solicitor for his professional charges would be coextensive only with his client's interest, and on the client's decease the solicitor would be bound to deliver up the deeds to the remainder-man, although his charges might remain unpaid.<sup>7</sup> So if the client should be a mortgagee, the solicitor having the deeds would be bound to deliver them to the mortgagor, on the reconveyance of the property, on payment to the mortgagee of all principal and interest; for on such reconveyance the mortgagee ceased to have any interest in the lands.<sup>8</sup> And, in like manner, if the client should be a mortgagor, the solicitor would have no right to retain the deeds as against the prior claim of the mortgagee;<sup>9</sup> and if the client should be a trustee, the deeds must be given up for the purposes of the trust.<sup>10</sup> This lien also extends only to charges strictly professional,<sup>11</sup> and to documents in the possession of the attorney or solicitor in his professional character;<sup>12</sup> but it has been held that such lien is assignable, together with the debt and documents, to a third person not a

<sup>1</sup> *Weldon v. Gould*, 3 Esp., 268.

<sup>2</sup> *Houghton v. Matthews*, 3 Bos. & Pul., 488; *Cowell v. Simpson*, 16 Ves., 280.

<sup>3</sup> *Man v. Shiffner*, 2 East, 523.

<sup>4</sup> *Davis v. Bowsher*, 5 T. R., 488; *Brandao v. Barnett*, 3 C. B., 519, 530 (54 E. C. L.).

<sup>5</sup> See *Rushforth v. Hadfield*, 6 East, 519; s. c., 7 East, 224; *Aspinall v. Pickford*, 3 Bos. & Pul., 44, note.

<sup>6</sup> *Stevenson v. Blakelock*, 1 Mau. & Sel., 535; *Ex parte Sterling*, 16 Ves., 258; *Ex parte Pemberton*, 18 Ves., 282.

<sup>7</sup> *Davies v. Vernon*, 6 Q. B., 443, 447 (51 E. C. L.).

<sup>8</sup> *Wakefield v. Newbon*, 6 Q. B., 276 (51 E. C. L.).

<sup>9</sup> *Smith v. Chichester*, 2 Dr. & War., 393; *Blunden v. Desart*, Ibid., 405; *Pelly v. Wathen*, 7 Hare, 351; s. c., 1 De Gex, Mac. & Gord., 16.

<sup>10</sup> *Baker v. Henderson*, 4 Sim., 27.

<sup>11</sup> *The King v. Sankey*, 5 Ad. & Ell., 423 (31 E. C. L.); *Worrell v. Johnson*, 2 Jac. & Walk., 218.

<sup>12</sup> *Champernown v. Scott*, 6 Madd., 93; *Balch v. Symes*, T. & Russ., 87.

solicitor or attorney.<sup>1</sup> A mere certificated conveyancer has no general lien on the documents in his hands.<sup>2</sup>

Lien, then, of whatever kind, is merely a right to retain the *possession* of the goods. This right of possession enables the person who has been in possession by virtue of the lien to maintain an action of trover for the goods;<sup>3</sup> but the *property* in the goods still remains with the owner; and, if the person having the lien should give up the possession of the goods, his lien will be lost;<sup>4</sup> the owner's property in them will draw to it the right of possession, and enable him to maintain an action of trover.<sup>5</sup> And if the person having the lien should take a security for his debt, payable at a distant day, his lien would on that account be lost, as it would be unreasonable that he should retain the goods till such future time of payment;<sup>6</sup> and in this case also an action of trover may be maintained by the owner of the goods, by virtue of the right of possession now accrued to him in respect of his property.<sup>7</sup>

Collateral securities for debts are of three kinds: liens, pledges and mortgages.<sup>8</sup>

I. Of these, liens are the lowest, being a mere right to hold goods, the property of another, as security for some debt, duty or other obligation.<sup>9</sup> Being a mere right to detain, it is lost if the lienee parts with the possession.<sup>10</sup> *Aliter* as to the lien for repairs to vessels.<sup>11</sup> But if the debtor obtains possession by a trick, the lienee may reclaim the goods,<sup>12</sup> as, on the other hand, the lienee's possession must, to sustain the lien, have been justly obtained and not by an illegal or fraudulent act.<sup>13</sup>

<sup>1</sup> Bull v. Faulkner, 2 De. G. & S., 772, *sed qu.*

<sup>2</sup> Hollis v. Claridge, 4 Taunt., 807; Steadman v. Hockley, 15 M. & W. 553.

<sup>3</sup> Legg v. Evans, 6 M. & W., 36.

<sup>4</sup> Kruges v. Wilcox, Amb., 254.

<sup>5</sup> Sweet v. Pym, 1 East, 4.

<sup>6</sup> Cowell v. Simpson, 16 Ves., 275.

<sup>7</sup> Hewison v. Guthrie, 2 New Cas., 756, 759.

<sup>8</sup> Halliday v. Holgate, L. R., 3 Ex., 302.

<sup>9</sup> Arnold v. Delano, 4 Cush., 38; s. c., 50 Am. Dec., 754. See Story on Agency, v. 352; Kidegely v. Iglehart, 3 Bland, 542; Hammonds v. Barclay, 2 East, 235.

<sup>10</sup> Parks v. Hall, 2 Pick., 207, 212; U. S. v. Barney, 3 Am. L. J., 123; *Ex parte* Foster, 2 Story, 131; Parkard v. The Louisa, 2 Woodb. & M., 48; Stickney v. Allen, 10 Gray, 356; McFarland v. Wheeler, 26 Wend., 467; Perkins v. Boardman, 14 Gray, 481; Sullivan v. Tuck, 1 Md. Ch., 61.

<sup>11</sup> The Nestor, 1 Sumn., 73.

<sup>12</sup> Bigelow v. Heaton, 6 Hill (N. Y.), 43.

<sup>13</sup> Randel v. Brown, 2 How., 407, 424.

The giving of credit to the debtor is construed to be a waiver of lien, by implication.<sup>1</sup> But the presumption that, by giving credit, the lienee intended to part with the goods before payment, may be rebutted.<sup>2</sup> If the chattel remains in the possession of the lienee until the expiration of the credit given, it revives if the debt is not paid.<sup>3</sup> And if, though given up, the chattel afterwards returns into the lienee's hands, the lien may revive, except as against intervening rights of third persons.<sup>4</sup>

And so essential is possession that the lien is lost if the goods are levied upon or attached, even at the lienee's instance and for the debt they are held to secure, on the ground that such levy or attachment terminates his possession; and if the attachment or execution should fail, as by irregularity, etc., general creditors will be let in.<sup>5</sup>

The lien, being merely a right to detain, the lienee has, in the absence of local statutes, no power of sale to realize his debt.<sup>6</sup> In many of the States, however, the power to sell is given to common carriers and others by statute.

If the detention does not induce payment, the lienee must either file a bill in equity to enforce his lien, or take judgment at law and sell under execution.<sup>7</sup>

Liens are said to be of four kinds, namely: at common law, by custom, by contract, and statutory liens. Liens by contract, however, are rather in the nature of pledges.<sup>8</sup> There are, more-

<sup>1</sup> *Spartali v. Benecke*, 10 C. B., 212 (70 E. C. L.), s. c., 19 L. J., C. P., 293; *Crawshay v. Homfray*, 4 B. & Ald., 50 (6 E. C. L.); *Brown v. Gilman*, 1 Mason, 212; *Cowell v. Simpson*, 16 Ves., 276. And see *Horncastle v. Farran*, 3 B. & A., 497 (5 E. C. L.); *Hewison v. Guthrie*, 2 Bing. (N. C.), 755 (29 E. C. L.).

<sup>2</sup> *Field v. Lelean*, 6 H. & N., 617.

<sup>3</sup> See *Dennets v. Cutts*, 11 N. H., 163.

<sup>4</sup> *Spring v. S. C. Ins. Co.*, 8 Wheat., 286-7.

<sup>5</sup> *Legg v. Willard*, 17 Pick., 140; *Jacobs v. Latour*, 5 Bing., 506. (15 E. C. L.). See also *Holly v. Huggesford*, 8 Pick., 73. But see, *contra*, *Townsend v. Newell*, 14 Pick., 332.

<sup>6</sup> 2 Kent Com., 642; 1 Chit. Gen. Prac., 492; *Jones v. Pearle*, 1 Strange, 557. *Pothomier v. Dawson*, Holt, N. P., 383; *Lickbarrow v. Mason*, 6 East, 21, note; s. c., Sm. Lead. Ca., 9th Am. ed., 1045; *Cortelgin v. Lansing*, 2 Caines Cas., 200; *Doane v. Russell*, 3 Gray, 382; *Briggs v. Boston & Lowell R. R.*, 6 Allen, 246; *Ridgely v. Iglehart*, 3 Bland, 543; *Lovett v. Brown*, 40 N. H., 88.

<sup>7</sup> *Fox v. McGregor*, 11 Barb., 41.

<sup>8</sup> *Ridgely v. Iglehart*, 3 Bland's Ch., 542.



over, liens existing only in equity, and cognizable only there.<sup>1</sup> Common law liens are, for the most part, of three kinds, viz.:

1. Liens given to particular vocations as compensatory for certain liabilities imposed upon them; thus, innkeepers, who are bound to entertain all suitable guests, common carriers, who are bound to convey all suitable passengers and freights, and farriers, who were required to serve all applicants, are allowed liens upon the chattels entrusted to them, for their just charges; it being too great a hardship to require them to serve all applicants, without affording them some security for their compensation.<sup>2</sup> In addition to the liability above stated, innkeepers<sup>3</sup> and common carriers<sup>4</sup> are insurers of the property of their guests and customers; and nothing but the act of God, or of public enemies, or the fault of the plaintiff, will excuse them in case of loss. The innkeeper is not liable, where the loss was occasioned by the guest's negligence.<sup>5</sup> Plaintiff must be *transiens*, i.e., a traveller, or the innkeeper will not be liable.<sup>6</sup> But the character of traveller is not lost by contracting for board by the week.<sup>7</sup> And if the guest is an agent, the innkeeper is liable to his principal, whose the stolen goods were, and the latter may sue.<sup>8</sup> Local statutes, in some of the States, extend to keepers of boarding-houses the right to lien on the personal effects of their boarders. Innkeepers have no lien on goods of a boarder, i.e., one not *transiens*.

It has been held, in contravention of the rule that no one can give to another greater right in property than he himself possesses, that a thief stopping at an inn with a stolen horse, gives the inn-

<sup>1</sup> *Ibid.*; Gladstone v. Birley, 2 Meriv., 403.

<sup>2</sup> See 2 Kent Com., 634; Grinnell v. Cook, 3 Hill, 490; Hollingsworth v. Dow, 19 Pick., 230.

<sup>3</sup> Sibley v. Aldrich, 33 N. H., 553; s. c., 66 Am. Dec., 745; Grinnell v. Cook, 3 Hill (N. Y.), 488; s. c., 38 Am. Dec., 663; Berkshire Woollen Co. v. Proctor, 7 Cush., 417; Mason v. Thompson, 9 Pick., 230; s. c., 20 Am. Dec., 471; see also, 18 Am. Rep., 130; 7 Am. Dec., 449; 24 *Ibid.*, 89; 29 *Ibid.*, 683.

<sup>4</sup> R. R. Co. v. Green, 25 Md., 89; McArthur v. Sears, 21 Wend., 190; The Niagara v. Cordes, 21 How., 7; Pendall v. Rensch, 4 McLean, 259 and 329; Hastings v. Pepper, 11 Pick., 41; The Zenobia, Abb. Adm., 80; Williams v. Grant, 1 Conn., 487; Coggs v. Bernard, Holt, 13; s. c., Sm. Lead. Ca., 9th Am. ed., 354; Lane v. Cotton, 1 Salk., 143, n.; Drinkwater v. Quenell, 7 Mod., 248.

<sup>5</sup> Elcox v. Hill, 98 U. S., 218; Myers v. Cottrill, 5 Biss., 465; Dunbier v. Day, 12 Neb., 596; s. c., 41 Am. R., 777 note.

<sup>6</sup> Berkshire Woollen Co. v. Proctor, 7 Cush., 417.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

keeper a lien on the horse which is good as against the rightful owner.<sup>1</sup> But common carriers who transport goods by direction of persons other than, and without the authority of, the owner, have no lien, either for their own freight charges, or those of other common carriers advanced by them, even though the goods are carried to the very point the owner designed.<sup>2</sup> Common carriers are not liable for losses arising from plaintiff's negligence or fault, or from secret defects or peculiarities in the goods shipped.<sup>3</sup> In admiralty, however, if the negligence be joint, the loss will be divided.<sup>4</sup> The presumption is that the loss was through the carrier's default, and the burden of proof is on him.<sup>5</sup> But the carrier, it seems, sufficiently sustains this burden if, upon the whole evidence, the cause of the injury is left *in doubt*, in which case the plaintiff cannot recover.<sup>6</sup>

II. In the second place, the common law gives a lien to all artisans, tradesmen and laborers entrusted with chattels by the owner for the purpose of repairing or improving the value of such chattels, for their just charges.<sup>7</sup> Thus, though livery-stable keepers and agisters, imparting no new value to the animals intrusted to them, have no lien;<sup>8</sup> horse-trainers have such liens as imparting

<sup>1</sup> *Yorke v. Greenough*, 2 Ld. Rym., 866; *Johnson v. Hill*, 3 Stark., 172 (3 E. C. L.); *King v. Richardson*, 6 Whart., 418, 423; *Grinnell v. Cook*, 3 Hill, 490. See also, *Black v. Brennan*, 5 Dana, 312; *Hollingsworth v. Dow*, 19 Pick., 230; and so of a piano: *Cook v. Prentice*, 13 Oregon, 482.

<sup>2</sup> *Clark v. Lowell & Russell R. R. Co.*, 9 Gray, 231; *Stevens v. Boston & Worcester R. R. Co.*, 8 Gray, 266; *Robinson v. Baker*, 5 Cush., 137; *Fitch v. Newberry*, 1 Doug. (Mich.), 1; *Bushkirk v. Purinton*, 2 Hall, 561. *Contra*, see *Yorke v. Greenough*, 2 Ld. Ray., 866; *King v. Richards*, 6 Whart., 418.

<sup>3</sup> *Clark v. Barnwell*, 12 How., 272; *Nelson v. Woodruff*, 1 Black, 156; *Hastings v. Pepper*, 11 Pick., 43; *Warden v. Greer*, 6 Watts, 424; *Rich v. Lambert*, 12 How., 347; *Farra v. Adams*, Bull., N. P., 69; *Davidson v. Gwynne*, 12 East., 381; *Sheels v. Davies*, 4 Camp., 119; *Shields v. Davis*, 6 Taunt., 65 (1 E. C. L.).

<sup>4</sup> *Snow v. Carruth*, 1 Sprague, 324.

<sup>5</sup> *Nelson v. Woodruff*, *supra*; *Rich v. Lambert*, *supra*; *Hunt v. The Cleveland*, 6 McLean, 76; *Beane v. Ropes*, 1 Sprague, 331; *Hastings v. Pepper*, *supra*.

<sup>6</sup> *Muddle v. S.ride*, 9 C. & P., 380 (38 E. C. L.); *Clark v. Barnwell*, 12 How., 281.

<sup>7</sup> *Townsend v. Sewell*, 14 Pick., 332; *Wilson v. Guyton*, 8 Gill, 215; *McIntyre v. Carver*, 2 W. & S., 392; *Hanna v. Phelps*, 7 Ind., 21; 2 Kent Com., 536, 627, 635.

<sup>8</sup> *Grinnell v. Cook*, 3 Hill, 492; *Wallace v. Woodgate*, 1 Car. & Payne, 575 (13 E. C. L.); *Judson v. Etheridge*, 2 Crompt. & M., 743; *Jackson v. Cummins*, 5 M. & W., 342; *Goodrich v. Willard*, 7 Gray, 183; *Miller v. Marston*, 35 Me., 153.

new value.<sup>1</sup> And though, in general, a lien cannot be created without authority of the owner,<sup>2</sup> liens for repairs take precedence of prior mortgages where such repairs were necessary for purposes within the intention of the mortgage; e.g., repairs on vessels or carriages which the mortgagor was to continue to use.<sup>3</sup>

The same principle has been applied in favor of one furnishing labor and materials in constructing a railroad, as against prior mortgages.<sup>4</sup>

III. In the third place, vendors have a lien, at common law, upon the goods sold, for their price.<sup>5</sup> But such a lien is for the price only; and cannot be extended to include storage or other charges for keeping the goods during the period of detention.<sup>6</sup> Delivery of the goods to a common carrier for conveyance to the purchaser is delivery to the purchaser, and therefore destroys the lien.<sup>7</sup>

If, however, after such delivery and before actual receipt by the vendee or his agent, the vendor learns of the vendee's insolvency, he may, by notice to the carrier, forbid delivery and reclaim the goods, thereby regaining his lien. This right is called *stoppage in transitu*.<sup>8</sup> And such right is not destroyed by the fact that

<sup>1</sup> Grinnell v. Cook, *supra*; Harris v. Woodruff, 124 Mass., 205; Bevan v. Waters, 3 Car. & P., 520 (14 E. C. L.); Scarfe v. Morgan, 4 M. & W., 270, 283; Forth v. Simpson, 13 Q. B., 680 (66 E. C. L.); 2 Kent Com., 634; Harris v. Woodruff, 124 Mass., 205.

<sup>2</sup> Hollingsworth v. Dow, 19 Pick., 228; Globe Works v. Wright, 106 Mass., 207.

<sup>3</sup> Williams v. Allsup, 10 C. B., N. S., 417 (100 E. C. L.); The Granite State, 1 Sprague, 277; Hammond v. Danielson, 126 Mass., 294. And see Donnell v. The Starlight, 103 Mass., 233.

<sup>4</sup> See Jessup v. Atlantic & Gulf R. R. Co., 3 Woods, 441.

<sup>5</sup> 2 Bl. Com., 448; Hinde v. Whitehouse, 7 East, 574; Boyd v. Mosely, 2 Swan, 661; 6 McLean, 472.

<sup>6</sup> *Somes v. British Empire Shipping Co.*, 1 Ell., B. & E., 353 (96 E. C. L.); see, also, *Ibid.*, 367; Cam. Scacc, 28 L. J., Q. B., 221; Greaves v. Ashlin, 3 Camp., 426; Benj. on Sales, Book V., pt. 1, c. 4, s. 1181, 4th Am. ed.

<sup>7</sup> Dawes v. Peck, 8 T. R., 330; Waite v. Baker, 2 Ex., 1, 7; Fragano v. Long, 4 B. & C., 219 (10 E. C. L.); Benj. on Sales, s. 1190, 4th Am. ed.; The Frances, 9 Cranch, 188; Prince v. Boston & Lowell R. R., 101 Mass., 546-7; Odell v. Boston & Maine R. R., 109 Mass., 50.

But see Callahan v. Babcock, 21 Ohio St., 281; Clarke v. Hutchins, 14 East, 475; The Frances, 8 Cranch, 418.

<sup>8</sup> Gibson v. Carruthers, 8 M. & W., 321, 337; Ruck v. Hatfield, 5 B. & A., 632 (7 E. C. L.); Noble v. Adams, 7 Taunt. 59 (2 E. C. L.); Stubbs v. Lund, 7 Mass., 453; s. c., 5 Am. Dec., 63; Callahan v. Babcock, 21 Ohio St., 281; Ryberg v. Snell, 2 Wash., 403; The Frances, 8 Cranch., 188.

advances upon, or partial payments for, the goods have been made; or that the goods were sold on credit.<sup>2</sup>

The right of stoppage *in transitu* is confined to vendors, and does not extend to factors or others who have parted with possession, and so lost their liens.<sup>3</sup> Attachment and possession by the creditors of the vendee, before possession by him, will not defeat the vendor's right of stoppage *in transitu*.<sup>4</sup> But, delivery to the carrier being delivery to the consignee (*supra*), prior sale by the latter to a third person and assignment of the bill of lading defeats the right.<sup>5</sup>

Several other vocations, not easily reducible to any special classification, and whose liens probably originated in custom, are entitled, some to general, and some to particular, liens at common law: as attorneys, clerks of court, bankers, factors and brokers, warehousemen, etc.<sup>6</sup>

A finder of property, for which a certain reward has been offered, has a lien upon it for the reward; otherwise, if the offer is of an uncertain, as a "liberal," reward.<sup>7</sup> If part only be found, the reward must be apportioned.<sup>8</sup>

Attorneys have a lien for the general balance due for their professional services, and advances made in the course of their employment upon all papers in their hands,<sup>9</sup> except wills.<sup>10</sup> This lien continues upon all papers and funds in the attorney's hands, notwithstanding his discharge and the employment of another by the client.<sup>11</sup> In addition, attorneys have a particular lien upon

<sup>1</sup> *Kinloch v. Craig*, 3 T. R., 119; *Hodgson v. Loy*, 7 *Ibid.*, 440; *Feise v. Wray*, 3 East, 93; *Edwards v. Brewer*, 2 M. & W., 375; *Van Casteel v. Booker*, 2 Ex., 702; *Benj. on Sales*, s. 1238, 4th Am. ed.

<sup>2</sup> *Stubbs v. Lund*, 7 Mass., 453; s. c., 5 Am. Dec., 63.

<sup>3</sup> *Kinloch v. Craig*, *supra*; *Sweet v. Pym*, 1 East, 4.

<sup>4</sup> *Callahan v. Babcock*, *supra*.

<sup>5</sup> *Walter v. Ross*, 2 Wash., 233; *Stubbs v. Lund*, *supra*; *Audenreid v. Randall*, 3 Cliff., 99; *Curry v. Roulstone*, 2 Overt., 110; *Ilseley v. Stubbs*, 9 Mass., 64; s. c., 6 Am. Dec., 29. <sup>6</sup> See *Bouv. Law Dict.*, title "Lien," and citations.

<sup>7</sup> *Wilson v. Guyton*, 8 Gill, 213; *Wentworth v. Day*, 3 Metc., 352; s. c., 37 Am. Dec., 145; *Deslondes v. Wilson*, 5 La., 397; s. c., 25 Am. Dec., 187, and note, 189.

<sup>8</sup> *Symmes v. Frazier*, 6 Mass., 344; s. c., 4 Am. Dec., 142.

<sup>9</sup> *Ex parte Sterling*, 16 Ves., 258; *Ex parte Pemberton*, 18 Ves., 282; *St. John v. Diefendorf*, 12 Wend., 261; *Dennett v. Cutts*, 11 N. H., 163; *Walter v. Sergeant*, 14 Vt., 247.

<sup>10</sup> *Balch v. Symes*, 1 Turn. & R., 87.

<sup>11</sup> *In re Paschal*, 10 Wall., 483.

judgments, decrees and awards recovered by them for their taxed costs, and, *after notice*, according to the weight of authority, for their fees, whether stipulated or contingent.<sup>1</sup> "A party should not run away with the fruits of a cause without satisfying the legal demand of his attorney."<sup>2</sup> "A mere shuffle between the plaintiff and the defendant should not be allowed to defeat the attorney of his lien."<sup>3</sup> There are authorities, however, which hold that there is no lien on the judgment in any case beyond the taxed costs.<sup>4</sup> The authorities, too numerous to be collected here, will be found in Weeks' Attorney-at-Law, s. 368, *et seq.* The attorney has no lien upon the cause, before judgment.<sup>5</sup> On funds realized, he has only a particular lien, for his costs in the particular case, or, at most, in cases covered by the same retainer.<sup>6</sup> He has, it seems, no lien upon a trust fund, but only a personal claim upon the trustee retaining him.<sup>7</sup>

A lien, being simply a right to detain, is not a property in the thing to which it attaches, and cannot therefore be levied upon or attached as the property, or as a chose in action, of the lienee.<sup>8</sup> *Holly v. Huggefurd* and *Kittredge v. Summer* are cases of pledges, to which, as also to mortgages, the same principle applies. In *Webb v. Sharp*, 13 Wall., 16-17, there is an *obiter dictum* that chattels held as collateral security may be sold under execution against the owner, subject to the duty of the purchaser at such sale to redeem from the lienee by payment of the debt secured. But,

<sup>1</sup> *Rooney v. Second Ave. R. R. Co.*, 18 N. Y., 368; *Wylie v. Coxe*, 15 How., 415; *In re Paschal*, *supra*.

<sup>2</sup> *Ld. Kenyon*, in *Reed v. Duffer*, 6 T. R., 362.

<sup>3</sup> *Omerod v. Tate*, 1 East, 464.

<sup>4</sup> *Forsythe v. Beveridge*, 52 Ill., 268; *Hill v. Brinkley*, 10 Ind., 102; *Getchell v. Clarke*, 5 Mass., 309; *Simmons v. Almy*, 103 Mass., 33.

<sup>5</sup> *Getchell v. Clark*, *supra*; *Potter v. Mayo*, 3 Green, 34; *Hobson v. Watson*, 34 Me., 20; *Hutchinson v. Howard*, 15 Vt., 544, and see *Ibid.*, 616; *Herchey v. Chicago*, 41 Ill., 136; *Pinkerton v. Easton*, L. R., 16 Eq., 490; *Foxon v. Gascoigne*, L. R., 9 Ch., 654; *Simmons v. Almy*, 103 Mass., 33, 35; *Lamon v. Wash.* etc. R. R. Co., 2 Mackey, 502.

<sup>6</sup> *Bozon v. Bollard*, 4 Myl. & Cr., 354; *Hall v. Laver*, 1 Hare, 571; *Worrall v. Harford*, 8 Ves., 4; 1 Schoul. Pers. Prop., s. 383.

<sup>7</sup> *Hall v. Laver* and *Worrall v. Harford*, *supra*.

<sup>8</sup> *Brace v. Marlborough*, 2 P. Wms., 491; *Meany v. Head*, 1 Mas., 319; *Ex parte Foster*, 2 Story, 131; *Legg v. Evans*, 6 M. & W., 36; *Harding v. Stevenson*, 6 H. & J., 264; *Holly v. Huggefurd*, 8 Pick., 73; *Kittredge v. Summer*, 11 Pick., 50.

in the absence of statutes, see, *contra*, the cases below cited.<sup>1</sup> If the sheriff levies, without tender of the amount due, he is liable as a trespasser, not merely for the pledgee's debt, but for the entire value of the goods.<sup>2</sup>

II. Pledges, the second form of collateral chattel security, advance one degree above liens, in that the pledgee has power to sell to realize his debt, if the pledgor makes default. Possession is as essential as in the case of liens.<sup>3</sup>

But, although possession must be continuous,<sup>4</sup> if the pledgor obtains the property by a trick, the pledgee may sue to regain.<sup>5</sup> *Aliter*, if in the meantime transferred to innocent third persons.<sup>6</sup> If the chattel is already in the possession of a third person, the latter may be regarded as the pledgee's agent.<sup>7</sup> And if already pledged to the pledgee, no formality of redelivery is necessary.<sup>8</sup>

Pledges being like liens in the particular that possession is indispensable, it is unnecessary to repeat the principles above stated bearing upon that essential requisite. Unlike liens, however, pledges, though leaving the general property in the pledgor, convey a special property to the pledgee, endowing him not only with the possession, but with a qualified power of disposition, *i.e.*, with power to sell on default.<sup>9</sup>

<sup>1</sup> *Scott v. Scholey*, 8 East, 467; *Metcalf v. Scholey*, 5 B. & P., 461; *Steif v. Hart*, 1 Comst., 20; *Marsh v. Lawrence*, 4 Cow., 461; *Wilkes v. Ferris*, 5 Johns., 336; *Badlam v. Tucker*, 1 Pick., 389; s. c., 11 Am. Dec., 202; *Sherman v. Davis*, 137 Mass., 133.

<sup>2</sup> *Pomeroy v. Smith*, 17 Pick., 85; *Swire v. Leach*, 18 C. B., N. S., 479 (114 E. C. L.); s. c., 34 L. J., C. P., 150.

<sup>3</sup> *Casey v. Cavaroc*, 96 U. S., 467; see, also, *Ibid.*, 492 and 496; *Adams v. Merchants' Nat. Bank*, 2 Fed. R., 174; s. c., 9 Biss., 396; *Ex parte Fitz.*, 2 Low., 519; *McLean v. Walker*, 10 Johns., 471; *Ward v. Sumner*, 5 Pick., 59; *Bousey v. Amee*, 8 Pick., 237 and citations; *Eastman v. Avery*, 23 Me., 250; *Russell v. Filmore*, 15 Vt., 135; *Walcott v. Keith*, 2 Fost., 197, 209; *Kimball v. Hildreth*, 8 Allen, 167. See 49 Am. Dec., 730; 42 *Ibid.*, 93; 51 *Ibid.*, 313.

<sup>4</sup> *Kimball v. Hildreth*, *supra*.

<sup>5</sup> *Walcot v. Keith*, *supra*; *Way v. Davidson* 12 Gray, 465. See, also, *Gibson v. Boyd*, 1 Kerr (N. B.), 150; 2 Saund., 47, e note; *Story on Bailm.* s. 299; *Edwards on Bailm.*, s. 269.

<sup>6</sup> *Way v. Davidson*, *supra*; *Bodenhamner v. Newson*, 5 Jones (N. C.), 107.

<sup>7</sup> *In Re Wiley*, 4 Biss., 171.

<sup>8</sup> *Brown v. Warren*, 43 N. H., 430.

<sup>9</sup> *Ryall v. Rolle*, 1 Atk., 167; *Pigott v. Cubley*, 15 C. B., N. S. 701 (109 E. C. L.); *Markham v. Jaudon*, 41 N. Y., 241; *Way v. Davidson*, *supra*; *Wright v.*

The power to sell after default is qualified, in the absence of contract to the contrary, by three imperative conditions, namely: that there be a prior demand for payment, a prior notice to the pledgor of the time and place of sale, and that the sale be made at public auction.<sup>1</sup> If pledgor has actual notice, absence of formal notice is immaterial;<sup>2</sup> and so if pledgor renders notice impossible.<sup>3</sup> Inability to find pledgor will not excuse,<sup>4</sup> though, if beyond seas, notice to his agent may suffice.<sup>5</sup> The pledgee cannot purchase, however fair the sale or the price; if he does, the sale is a nullity, if pledgor so elects, and the relation of pledgor and pledgee still continues.<sup>6</sup> Where, by contract, the sale is to be made by a third person as trustee, the party secured, having then no inconsistent duty to perform, may purchase on condition that he acts in good faith, with no improper use of his power over either the trustee or the sale.<sup>7</sup> If the pledgee sells without demand or notice, he is liable for the value of the goods, *less the debt due to him*.<sup>8</sup> The measure of damages, where suit is brought and prosecuted with reasonable diligence, is the highest market value of the property at any time between the conversion and the trial.<sup>9</sup> *Aliter*, if the property pledged were stocks, and pledgee was always ready and willing to transfer similar shares to the plaintiff.<sup>10</sup>

Ross, 36 Cal., 414, 429. And see note to *Wilson v. Little*, 51 Am. Dec., 314; *Wright v. Ross*, 36 Cal., 429; *Noles v. Marable*, 50 Ala., 366; *Coleman v. Shelton*, 2 McCord's Ch., 126.

<sup>1</sup> *Pigott v. Cubley*, *supra*; *Markham v. Jaudon*, *supra*; *Farwell v. Importers' Bank*, 90 N. Y., 490; 51 Am. Dec., 314, and citations; *Washburn v. Pond*, 2 Allen, 474; *Wheeler v. Newbold*, 16 N. Y., 392; *Bryan v. Baldwin*, 52 N. Y., 233; *Gay v. Moss*, 34 Cal., 322.

<sup>2</sup> *Alexandria R. R. v. Burke*, 22 Gratt., 254.

<sup>3</sup> *City Bank v. Babcock*, 1 Holmes, 181.

<sup>4</sup> *Strong v. National Banking Association*, 45 N. Y., 718.

<sup>5</sup> *Potter v. Thompson*, 10 R. I., 1.

<sup>6</sup> *Balto. Marine Ins. Co. v. Dalrymple*, 25 Md., 242 and citations; *Middlesex Bank v. Minot*, 4 Metc., 325; *Stokes v. Frazier*, 72 Ill., 428; *Bank of Old Dominion v. Dubuque R. R.*, 8 Iowa., 277. The only case to the contrary, it is believed, is *Olcott v. Tioga R. R. Co.*, 27 N. Y., 546.

<sup>7</sup> *Lyon v. Jones*, 6 Humph., 533; see, also, *Bean v. Barney*, 10 Iowa, 498.

<sup>8</sup> *Herkimer Co. v. Small*, 21 Wend., 273, 276. But see, as to the deduction, *Kater v. Steinart's Adm.*, 40 Pa. St., 501.

<sup>9</sup> *Romaine v. Van Allen*, 26 N. Y., 310; *Markham v. Jaudon*, 41 N. Y., 235; *Commercial Bank v. Kortright*, 22 Wend., 348, 366.

<sup>10</sup> *Atkins v. Gamble*, 42 Cal., 86, 102.

On what articles may be pledged, the obligations which may be secured by pledge, the duties, liabilities and rights of the pledgee, whether the pledgee may use the property pledged, the pledgor's right to redeem, etc., see the very exhaustive note to *Locketts v. Townsend*, 49 Am. Dec., 730 *et seq.*<sup>1</sup>

III. Mortgages, the highest class of collateral securities, differ from liens in that there is the power to sell, and from both liens and pledges in that possession is not essential; the mortgagor by stipulation may, and usually does, retain possession until default. Unlike pledges, the *general* property passes to the mortgagee, subject merely to defeasance upon payment of the debt secured.<sup>2</sup>

Where the collateral is a chose in action, the fact that it is so assigned as to pass the title does not, however, necessarily make the security a mortgage, since transfer of the title may have been designed only to make the chose effective as a pledge.<sup>3</sup>

On the principle that two parties are essential to every contract, a mortgage made and recorded by a debtor in favor of creditors who have no knowledge of it, will fail as against other creditors who attach before the mortgagees acquire knowledge and approve; and where there are several such mortgages, the mortgagee first approving or accepting has priority.<sup>4</sup> But see cases, *contra*, below cited, on the ground of assent presumed.<sup>5</sup>

Where the mortgage overstates the debt, to hinder, delay, or defraud other creditors, it is void, not merely as to the excess, but *in toto*; <sup>6</sup> *aliter*, if only constructively fraudulent; <sup>7</sup> and the mere fact

<sup>1</sup> See, also, 42 Am. Dec., 93.

<sup>2</sup> *Jones v. Smith*, 2 Ves., Jr., 372; *Conard v. Atlantic Ins. Co.*, 1 Pet., 336, 441; *Barrow v. Paxton*, 5 Johns., 258; *Brown v. Bement*, 8 Johns., 96; *Badlam v. Tucker*, 1 Pick., 399; s. c., 11 Am. Dec., 202; *Story's Eq. Jur.*, s. 1030; *Coles v. Clark*, 3 Cush., 399; *Parshall v. Egbert*, 54 N. Y., 23; *Wilson v. Brannan*, 27 Cal., 271.

<sup>3</sup> *Gay v. Mass*, 34 Cal., 132.

<sup>4</sup> *Oxnard v. Blake*, 45 Maine, 602; *Maynard v. Maynard*, 10 Mass., 456; *Harrison v. Phillips Academy*, 12 Mass., 461; *Welch v. Sackett*, 12 Wis., 270.

<sup>5</sup> *Webster v. Harkness*, 3 Mackey, 220; and see *Tompkins v. Wheeler*, 16 Pet., 118-19; *Halsey v. Whitney*, 4 Mason, 214; *Treadwell v. Buckley*, 4 Day, 395; *Thompson v. Leach*, 2 Salk., 618.

<sup>6</sup> *Wallach v. Wylie*, 28 Kan., 97; *Horton v. Williams*, 21 Minn., 187; *Russell v. Winne*, 37 N. Y., 591; *Rich v. Levy*, 16 Md., 74; *Robinson v. Holt*, 39 N. H., 557; *Young v. Pate*, 4 Yerg., 164; *Butts v. Peacock*, 23 Wis., 359; *Smith v. Hardy*, 36 Wis., 422; *Henderson v. Henderson*, 55 Mo., 534, 555; *Jones on Chattel Mortgages*, s. 339, 350, and citations.

<sup>7</sup> *Jones Chat. Mortg.*, s. 351.



that a mortgage covers more property than is sufficient to secure the debt is not a badge of fraud.<sup>1</sup>

As to mortgages of after acquired chattels, see *post*, pp. 55-57.

When goods are taken under a distress for rent, the property in the goods still remains in the owner, until a sale is made pursuant to the statute<sup>2</sup> by which a sale is authorized.<sup>3</sup>

<sup>1</sup> *Douns v. Kissaw*, 13 How., 102.

<sup>2</sup> Stat. 2. Wm. & Mary, Sees. 1, c. 5, s. 2.

<sup>3</sup> *King v. England*, 4 B. & S., 782 (116 E. C. L.).

## CHAPTER III.

### OF THE ALIENATION OF CHOSSES IN POSSESSION.

CHOSSES in possession have always been freely alienable from one person to another. The feudal principles of tenure, which in ancient times opposed the alienation of landed estates, could have no application to the then insignificant subjects of personal property; although the full right of testamentary disposition was not, as we shall hereafter see, enjoyed in early times. But, though the property in personal chattels may be freely aliened, it is impossible for a man to make a valid grant in law of that in which he has no actual or potential property, but which he only expects to have. A person who has an interest in land may grant all the fruit which may grow upon it hereafter.<sup>1</sup> So a grant of the next year's wool of all the sheep which a man now has is valid, because he has a potential property in such wool.<sup>2</sup> But a grant of the wool of all the sheep which a man ever shall have is void.<sup>3</sup> And in the same manner the assignment of a man's stock in trade passes only such articles as are his property at the time he executes such assignment, and will not comprise any other articles which he may afterwards purchase<sup>4</sup>; not even if the instrument of assignment should purport to convey all goods which should at any time thereafter be in or upon his dwelling-house.<sup>5</sup> The property in goods to be hereafter acquired may however be effectually passed by an assignment thereof in equity coupled with a license to seize them.<sup>6</sup>

<sup>1</sup> *Grantham v. Hawley*, Hob., 132; *Petch v. Tutin*, 15 M. & W., 110.

<sup>2</sup> *Per Pollock*, C. B., 15 M. & W., 116.

<sup>3</sup> *Com. Dig. tit. Grant (D)*.

<sup>4</sup> *Tapfield v. Hillman*, 6 M. & G. 245 (46 E. C. L.); s. c., 6 Scott N. R. 967.

<sup>5</sup> *Lunn v. Thornton*, 1 C. B., 379 (50 E. C. L.); *Gale v. Burnell*, 7 Q. B., 850 (53 E. C. L.); *Belding v. Read*, Exch., 11 Jur. N. S., 547; s. c., 3 H. & C., 955.

<sup>6</sup> *Congreve v. Evetts*, 10 Exch., 298; *Hope v. Hayley*, 5 E. & B., 830; *Allatt v. Carr*, Exch., 6 W. R. 578; *Chidell v. Galsworthy*, 6 C. B. N. S., 471 (95 E. C. L.); *Holroyd v. Marshall*, 10 Il. of L. Cas., 191; 9 Jur. N. S., 213; *Reeve v. Whitmore*, L. C., 12 W. R., 113; 9 Jur. N. S., 1214; *Brown v. Bateman*, Law Rep., 2 C. P., 272; *Blake v. Izard*, C. P., 16 W. R., 108.

This proposition, namely, that a deed of assignment, though expressly professing to do so, is ineffectual to convey after acquired goods and chattels, is supported by numerous American authorities.<sup>1</sup>

And a purchaser from the mortgagor who expressly buys "subject to" the mortgage in question, is not estopped to deny that it binds the after-acquired property.<sup>2</sup>

Moreover, if the mortgaged goods have become so intermingled with the after-acquired property as to be undistinguishable, the rights of purchasers or levying creditors prevail.<sup>3</sup>

By some of the authorities, however, it is maintained that a mortgage of after-acquired property creates an equitable lien, which will prevail against a subsequent judgment or attaching creditor.<sup>4</sup>

Where the property to be purchased is raw material, the mortgage may bind not only such material, but the product to be made therefrom.<sup>5</sup> Where the after-acquired property is delivered by the mortgagor to the mortgagee, the latter's equitable lien is perfected, even as against creditors.<sup>6</sup> And it has been held, in Maine, that a mortgage not professing to bind after-acquired goods will do so, at law, and even against creditors, if they are bought by the mortgagor with the proceeds of goods covered by the mortgage and sold by him.<sup>7</sup>

In many of the United States, a mortgage of a stock of merchandise under which the mortgagor is to remain in possession and make sales in the usual course of business for his own benefit, is

<sup>1</sup> *Jones v. Richardson*, 10 Metc., 481; *Moody v. Wright*, 13 Metc., 17; *Barnard v. Eaton*, 2 Cush., 294; *Codman v. Freeman*, 3 Cush., 306; *Chessley v. Josselyn*, 7 Gray, 489; *Rose v. Bevan*, 10 Md., 466; *Chapin v. Cram*, 40 Me., 561; *Sharpe v. Pearce*, 74 N. C., 600; *St. Louis Drug Co. v. Dart*, 7 Mo., App., 590; *Hamilton v. Rogers*, 8 Md., 301; *Williams v. Briggs*, 11 R. I., 476; *Rhines v. Phelps*, 8 Ill., 455.

<sup>2</sup> *Chessley v. Josselyn*, *supra*. But see *Robson v. Central R. R. Co.*, 37 Mich. 70; *Am. Cigar Co. v. Foster*, 36 Mich., 368; *People v. Bristol*, 35 Mich., 28; *Cadwell v. Pray*, 41 Mich., 307; *McGee v. Fitzer*, 37 Tex., 27.

<sup>3</sup> *Hamilton v. Rogers*, 8 Md., 301.

<sup>4</sup> *Parker v. Jacobs*, 14 S. C., 114; *Mitchell v. Winslow*, 2 Story's R., 630; *Smithurst v. Edmunds*, 114 N. J., Eq., 409; *Wright v. Bircher's Ex'r.*, 72 Mo., 179. See *Butt v. Ellett*, 19 Wall., 544; also, *Beall v. White*, 94 U. S., 382; *Senter v. Mitchell*, 16 Fed. Rep., 206; *U. S. v. New Orleans R. R.*, 12 Wall., 362; *Lounis v. Davenport, etc.*, R. R., 3 McCrary, 489; s. c., 17 Fed. Rep., 301.

*Frank v. Playter*, 73 Mo., 672; *Rutherford v. Stewart*, 79 Mo., 216.

<sup>6</sup> *Langton v. Horton*, 1 Hare, 549.

<sup>7</sup> *Abbott v. Goodwin*, 20 Me., 408.

void as against creditors, while in others such a mortgage is valid. The authorities, too numerous to be cited here, will be found collected in Jones on Chattel Mortgages.<sup>1</sup> In the District of Columbia, not cited in the work referred to, the former rule is followed.<sup>2</sup>

The intent to permit mortgagor to sell, if not apparent on the instrument, may be shown by parol.<sup>3</sup> If the mortgagor is to sell and apply proceeds to payment of the debt secured, *semble*, the mortgage would be good.<sup>4</sup> If the mortgage covers other chattels, such as fixtures etc., as well as merchandise, it may in some jurisdiction stand good as to the former though void as to the latter.<sup>5</sup>

The manner in which the alienation of personal chattels is effected, is in many respects essentially different from the modes of conveying real estate. In ancient times, indeed, there was more similarity than there is at present. The conveyance of land was then usually made by feoffment, with livery of seisin, which was nothing more than a simple gift of an estate in the land accompanied by delivery of possession.<sup>6</sup> This gift might then have been made by mere word of mouth;<sup>7</sup> but the Statute of Frauds<sup>8</sup> made writing necessary. Personal chattels, on the contrary, are still alienable by mere *gift and delivery*; though they may be disposed of by *deed*; and they are also assignable by *sale*, in a manner totally different from the conveyance requisite on the transfer of real estate. Each of these three modes of conveyance deserves a separate notice.

1. And, first, personal chattels are alienable by a mere gift of them, accompanied by delivery of possession. For this purpose no deed or writing is required, nor is it essential that there should be a

<sup>1</sup> s. 379 to 425; and see *Twyne's Case*, Am. notes, Smith's Lead. Cas., 9th Am. ed., 1.

<sup>2</sup> *Smith v. Kenney*, 1 Mackey, 12; *Fox v. Davidson*, *Ibid.*, 102.

<sup>3</sup> *Bullene v. Barrett*, 87 Mo., 185; *In re Kahley*, 2 Biss., 383; *Barnet v. Fergus*, 51 Ill., 352; *contra*, see *Decker v. D'Oench*, 31 Mo., 451.

<sup>4</sup> See *Robinson v. Elliot*, 22 Wall., 524.

<sup>5</sup> *State v. D'Oench*, 31 Mo., 353; *Donnell v. Byern*, 69 Mo., 468; *In re Kirkbride*, 5 Dill., 116; *contra*, *Horton v. Williams*, 21 Minn., 187; *Russell v. Winne*, 37 N. Y., 591.

<sup>6</sup> See *Williams' Real Property*, 113, 2d ed.; 118, 3d & 4th eds.; 121, 5th ed.; 127, 6th ed.; 130, 7th ed.; 138, 8th ed.; 6th Am. ed., 116.

<sup>7</sup> See *Williams' Real Property* 117, 2d ed.; 122, 3d & 4th eds.; 128, 5th ed.; 134, 6th ed.; 137, 7th ed.; 143, 8th ed.; 6th Am. ed., 120.

<sup>8</sup> Stat., 29 Car., II., c. 3, s. 1, 2.

consideration for the gift. Thus, if I give a horse to A. B., and at the same time deliver it into his possession, this gift is complete and irrevocable, and the property in the horse is thenceforward vested in A. B.<sup>1</sup> But if I purport to assign the horse, and yet retain the possession, the gift, though made by writing (so that it be not a deed), is absolutely void at law,<sup>2</sup> and equity will give no relief to the donee.<sup>3</sup> It may, however, be observed, that if the donor should not attempt to part with the subject of gift, but should declare that he keeps possession of it *in trust* for the donee, equity will seize on and enforce this trust, although voluntarily created.<sup>4</sup> In some cases it is not possible to make an immediate and complete delivery of the subject of gift; and, in these cases, as near an approach as possible must be made to actual delivery; and if this be done the gift will be effectual. Thus, if goods be in a warehouse, the delivery of the key will be sufficient;<sup>5</sup> timber may be delivered by marking it with the initials of the assignee,<sup>6</sup> and an actual removal is not essential to the delivery of a haystack.<sup>7</sup> But the delivery of a part of goods capable of actual delivery, is not a sufficient delivery of the whole.<sup>8</sup>

When goods are in the custody of a simple bailee, such as a wharfinger or carrier, the possession of such bailee is, as we have seen,<sup>9</sup> constructively the possession of the bailor; and either the bailor or bailee may maintain an action of trover in respect of the goods. This constructive possession of the bailor may be delivered by him to a third person, by making as near an approach to actual

<sup>1</sup> 2 Black. Com., 441.

<sup>2</sup> *Irons v. Smallpiece*, 2 B. & Ald., 551; *Miller v. Miller*, 3 P. Wms., 356; *Bourne v. Fosbrooke*, 18 C. B. N. S., 515 (114 E. C. L.). See also *Shower v. Pilck*, 4 Ex. Rep., 478.

<sup>3</sup> *Antrobus v. Smith*, 12 Ves., 39, 46; *Edwards v. Jones*, 1 My. & Cr., 226; *Dillon v. Coppin*, 4 My. & Cr., 647, 671.

<sup>4</sup> *Ellison v. Ellison*, 6 Ves., 656; *Ex parte Dubost*, 18 Ves., 140, 150; *Vandenberg v. Palmer*, 4 Kay & John., 204; *Jones v. Lock*, L. C., 11 Jur. N. S., 913, correcting *Scales v. Maude*, 6 De G., M. & G., 43, 51.

<sup>5</sup> *West v. Skip*, 1 Ves., Sr., 244; *Ryall v. Rowles*, 1 Ves. Sr., 362; s. c., nom., *Ryall v. Rolle*, 1 Atk., 171; *Ward v. Turner*, 2 Ves. Sr., 443.

<sup>6</sup> *Stoveld v. Hughes*, 14 East, 308.

<sup>7</sup> *Chaplin v. Rogers*, 1 East, 190. See *Young v. Matthews*, Law Rep., 2 C. P., 127.

<sup>8</sup> Per Pollock, C. B., 14 M. & W., 37, correcting a dictum of Taunton, J., 2 A. & E. 73 (29 E. C. L.).

<sup>9</sup> *Ante*, p. 39.

delivery as is possible under the circumstances of the case. By the custom of Liverpool, the delivery of goods in another person's warehouse is effected by merely handing over a delivery order;<sup>1</sup> and the property in wines in the London Docks appears to pass by the indorsement and delivery of the dock warrant.<sup>2</sup> But, in the absence of a custom to the contrary, it would seem that there can be no legal delivery of goods into the hands of a third person without the consent of the warehouseman or wharfinger in whose custody the goods are.<sup>3</sup> When goods are at sea, the delivery of the bill of lading, after its indorsement, is a delivery of the goods themselves;<sup>4</sup> for it is not possible, in this case, to make any nearer approach to an actual delivery.<sup>5</sup>

Personal property, by the common law, may pass by gift or grant, with or without a deed, delivery of either the chattel or of the deed of gift rendering the transfer of title complete, without any consideration; but a gift by parol, whether *inter vivos* or *causa mortis*, without delivery, will not alter the property;<sup>6</sup> and a gift by deed, unaccompanied by delivery of the chattel, or, under the modern registry system, record of the deed, would be ineffectual except as between the parties. Delivery is as essential to the validity of a gift as to that of a sale.<sup>7</sup> Not only must the subject-matter and the beneficiary of the gift be designated with legal certainty, but there must be a present intention to part with both the possession and the property in the thing given, and a manifestation of that intention by either an actual or a constructive delivery, whether the gift be *inter vivos* or *causa mortis*, there being in this respect no difference between the two classes of gifts.<sup>8</sup> If there is only an inten-

<sup>1</sup> *Dixon v. Yates*, 5 B. & Ad., 313 (27 E. C. L.); and see *Greaves v. Hepke*, 2 B. & Ald., 131; *Kingsford v. Merry*, 1 H. & N., 503.

<sup>2</sup> *Ex parte Davenport*, Mon. & Bl., 165. Delivery orders are now subject to a stamp duty of one penny, and dock warrants to a stamp duty of threepence, by statutes 23 Vict., c. 15, and 23 & 24 Vict., c. 111.

<sup>3</sup> *Zwinger v. Samuda*, 7 Taunt., 265 (2 E. C. L.); *Lucas v. Dorrien*, *Ibid.*, 278; *Bryans v. Nix*, 4 M. & W., 775, 791; *M'Ewan v. Smith*, 2 H. of L. Cases, 309; and see *Pearson v. Dawson*, 1 E. B. & E., 448 (96 E. C. L.).

<sup>4</sup> *Mitchell v. Ede*, 11 A. & E., 888 (39 E. C. L.); and see stat. 18 & 19 Vict., c. 111.

<sup>5</sup> *Ryall v. Rowles*, 1 Ves. Sr., 362; s. c., nom., *Ryall v. Rolle*, 1 Atk., 171.

<sup>6</sup> *Fulton v. Fulton*, 48 Barb., 581.

<sup>7</sup> *Mahan v. U. S.*, 16 Wall., 143.

<sup>8</sup> *Basket v. Hassell*, 107 U. S., 602; *Newton v. Snyder*, 44 Ark., 42; *Luisenbigler v. Gourley*, 56 Pa. St., 166; *Crawford's Appeal*, 61 Pa. St., 52; *Coleman v. Parker*, 114 Mass., 30.

tion to give, and no delivery is made, it will be inchoate and incomplete, however strong the expression of intention may be.<sup>1</sup> Thus, where a father placed bonds in two envelopes, indorsing thereon and signing a memorandum that they belonged to his two sons, in specified proportions, but that the interest was reserved to himself during his life, after which he always spoke of the bonds as the property of the sons, it was held invalid as a gift, both because there was no delivery, and because it was not intended to take effect *in præsenti*, but *in futuro*.<sup>2</sup> Upon the latter proposition, it was declared to be an elementary proposition that an attempted gift to take effect in possession *in futuro* amounts only to a promise to make a gift, which is *nudum pactum*.<sup>3</sup> Even where the gift is by deed, and purports to pass a present title, but with a reservation of the beneficial interest for a period, as for the life of the donor, it is invalid; there must be, not only a present transfer, but a purpose to pass a present right of property.<sup>4</sup> And, as a necessary sequence to the proposition that there can be no valid gift without a present transfer of both possession and the right of property, there cannot, *at law*, be a direct and immediate gift of personalty to persons not *in esse*, as a gift *in præsenti* to the donor's then living children and such as should be born thereafter; though, in equity, a shifting use would doubtless be thus created, enuring to the use of the after-born children as they came into being, except as against third persons without notice.<sup>5</sup>

As in the case of sales (*infra*, p82), where the property is already in the possession of him to whom it is intended to transfer the title, the gift may be effected by a simple oral declaration, if complete and unambiguous, without the idle and unmeaning ceremony of a return to the donor in order that formal delivery may accompany the gift.<sup>6</sup> But if the language of the declaration implies a promise to give in future, title does not pass.<sup>7</sup> So delivery,

<sup>1</sup> *Nolen v. Harden*, 43 Ark., 307; s. c., 51 Am. Rep., 563; *Burney v. Ball*, 24 Ga., 505; and see *Taylor v. Henry*, 48 Md., 550.

<sup>2</sup> *Young v. Young*, 80 N. Y., 422; approved in *Brunn v. Schuett*, 59 Wis., 261; s. c., 48 Am. Rep., 499.

<sup>3</sup> Citing *Pitts v. Mangum*, 2 Bail., 588.

<sup>4</sup> *Sutton's Exr. v. Hallowell*, 2 Dev., 186; *Lance v. Lance*, 5 Jones' L., 413.

<sup>5</sup> *Holl v. Thomas*, 3 Strobb., 101.

<sup>6</sup> *Champney v. Blanchard*, 39 N. Y., 111; *Wing v. Merchant*, 57 Me., 383.

<sup>7</sup> *Shower v. Pilck*, 4 Exch., 478; and see *Cutting v. Gilman*, 41 N. H., 147; *French v. Raymond*, 39 Vt., 623.

though essential, need not be to the donee in person, but may be to a third person as bailee, for his benefit.<sup>1</sup>

As has been intimated above, delivery, though essential, need not always be actual. It must always, however, be according to the nature of the thing. It may be constructive.<sup>2</sup> Thus, in a gift of wild cattle made by a father to his son, branding the cattle in the son's name, and recording the brand, was held to be a sufficient symbolical delivery;<sup>3</sup> and a gift of furniture by a mother to her sons, one of whom lived in the house with her, and therefore had such possession as was possible, was in a like manner held valid;<sup>4</sup> the object of the gift, namely, to have the property pass to the donor's children without the expense of administration, being declared natural and reasonable. An executed gift of personal property from father to a minor child residing in his family is valid and irrevocable, although the property continues in the house occupied by the family;<sup>5</sup> and where a father gave a piano to his daughter on her attaining her majority, it was held valid as against an attachment by subsequent creditors of the father, made with his consent, although the daughter, after the gift was made, had sometimes lived away from the father's house, leaving the piano there.<sup>6</sup> In *Case v. Dennison*,<sup>7</sup> a gift *causa mortis* was held to fail for want of delivery, although it was sought to be made, and actual delivery was impossible because the subject-matter of the gift was out of the donor's reach; but this clearly is at variance with the weight of modern authority.<sup>8</sup> A person who is *sui juris*, acting freely, fairly and with sufficient knowledge, has a legal right to make a binding and effectual voluntary gift of whatever is his own property, whether capable or incapable of manual delivery, whether in possession or reversion, whether at hand or at a distance;<sup>9</sup> and it is not the intention of the law to take from the owner this power, but merely to require that he shall do what, under the circumstances, will be reasonably equivalent to an actual

<sup>1</sup> *Gardner v. Merritt*, 32 Md., 78; *Hill v. Stevenson*, 63 Me., 364; *Nolen v. Harden*, 43 Ark., 307; s. c., 51 Am. Rep. 563.

<sup>2</sup> 2 Kent Com., 439.

<sup>3</sup> *Hillebrant v. Brewer*, 6 Tex., 45.

<sup>4</sup> *Harris v. Hopkins*, 43 Mich., 272.

<sup>5</sup> *Kellogg v. Adams*, 51 Wis., 138; *contra*, *Willey v. Backus*, 52 Iowa, 401.

<sup>6</sup> *Rose v. Draper*, 55 Vt., 624.

<sup>7</sup> 9 R. I., 88.

<sup>8</sup> *Stephenson's Admr. v. King*, 81 Ky., 425; *Elam v. Keen*, 4 Leigh, 333.

<sup>9</sup> *Kenewich v. Manning*, 1 De G., M. & G., 187; *Fulton v. Fulton*, 48 Barb., 581.



delivery.<sup>1</sup> But it must be actual, so far as the subject is capable of delivery, and must be the true and effectual method of obtaining the command and dominion of the subject.<sup>2</sup> Thus a voluntary written assignment, under seal, of certain stock of a corporation, transferable under its rule only on the books of the corporation, and never so transferred during the life time of the donor, was held invalid for want of such transfer, and the donee was declared not to be entitled to the aid of a court of equity to enforce it, either as against the donor in his life-time or his administrator after his death, since equity cannot make that a good and enforceable gift which was incomplete and therefore not enforceable at law.<sup>3</sup>

The comparative simplicity, in earlier times, when personal property was inconsiderable both in amount and value, of the rules relating to delivery as essential to the validity of gifts, has been materially changed, since the great modern increase in the importance and character of that species of property, by the introduction of the doctrines of *equitable assignments* and of *trusts* into the law of transfer by gift, a change resulting doubtless from the efforts of courts, on the one hand, to adhere to the already established requirement of delivery, both upon the principle of *stare decisis*, and because of the obvious propriety and good policy of refusing to compel men to part with their property, without any consideration or equivalent therefor, upon the strength of mere declarations of purpose or intention, easily feigned and, where genuine, frequently misunderstood, insisting, as a prerequisite to such compulsion, that such declarations shall be accompanied by an act or formality upon the part of the owner which can leave no doubt of his intention, and, on the other hand, to render that requirement no greater an obstacle to the giving of just effect to meritorious and important attempted disposition of property than is absolutely unavoidable.<sup>4</sup>

An equitable assignment is a transfer, either gratuitous or upon a consideration, which vests in the donee or purchaser an equitable title merely, without a transfer of the legal title, enabling him

<sup>1</sup> *Elam v. Keen, supra.*

<sup>2</sup> 2 Kent Com., 439; *Fulton v. Fulton, supra.*

<sup>3</sup> *Baltimore Retort, etc., Co. v. Mali*, 65 Md., 93; *Heartley v. Nicholson*, L. R., 19 Eq., 233; but see *Cushman v. Thayer Mfg. Co.*, 76 N. Y., 335, and *infra*, pp. 65-69, as to *trusts*.

<sup>4</sup> See *Heartley v. Nicholson*, L. R., 19 Eq., 233.

to sue, if suit be necessary to realize the benefit of the transaction, not in his own name, but in the name of the assignor to the use of the assignee. And it is now well settled that choses in action not negotiable, and negotiable paper not indorsed, may be the subject of such equitable assignment by way of gift, enabling the donee to sue, in the name of the donor or his administrator, to his own use, not only without the consent of the latter, but even where the administrator appears and protests against it;<sup>1</sup> and although the donee after the delivery returned the chose for safe keeping to the donor, who died with it in his possession.<sup>2</sup> And the gift of an unindorsed negotiable note carries a collateral mortgage with it.<sup>3</sup> In like manner, savings bank-books, containing entries of deposits to the credit of the donor, and certificates of deposit, represent the funds they evidence; and delivery of them as a gift constitutes valid equitable assignments.<sup>4</sup> But where one deposited money in a savings bank in the name of another, not in view of death, and retained the pass-book in his own possession until his death, neither at the time of the deposit nor afterwards declaring any intention of holding the fund in trust for the person in whose name it was deposited, it was held that there was neither a gift nor a trust;<sup>5</sup> and where a father in like manner made deposits in the name of his children, without their knowledge, retaining the bank-books, and directing that the funds should be held subject to his order, the court declared that if, as has been held in some cases, retention of the pass-book is not inconsistent with the completeness of a gift and notice to the donee is not essential,<sup>6</sup> still there must be some evidence of an intention to create a trust or make a gift before either can be said to exist.<sup>7</sup> Delivery of one's own check, intended as a gift of the

<sup>1</sup> *Wing v. Merchant*, 57 Me., 383; *Bates v. Kempton*, 7 Gray, 382.

<sup>2</sup> *Grover v. Grover*, 24 Pick., 261.

<sup>3</sup> *Smith v. Ferguson*, 90 Ind., 229.

<sup>4</sup> *Basket v. Hassell*, 107 U. S., 602; *Hill v. Stevenson*, 63 Me., 364; *Camp's Appeal*, 36 Conn., 88; *Marcy v. Amazeen*, 61 N. H., 131; *Pierce v. Bank*, 129 Mass., 425; *Tillinghast v. Wheaton*, 8 R. I., 536; *contra*, *Ashbrook v. Ryan*, 2 Bush., 228. The authority of *Ashbrook v. Ryan*, however, is shaken by *Stephenson's Admr. v. King*, 81 Ky., 425.

<sup>5</sup> *Robinson v. Ring*, 72 Me., 140.

<sup>6</sup> *Martin v. Funk*, 75 N. Y., 134, 143; s. c., 31. Am. Rep., 456; *Blasdel v. Locke*, 52, N. H., 283, 243.

<sup>7</sup> *Marcy v. Amazeen*, *supra*, citing *Brabook v. Bank*, 104 Mass., 228; *Clark v. Clark*, 108 Mass., 522; *Blasdel v. Locke*, *supra*; *Sheegag v. Perkins*, 4 Baxt., 278.

fund on which it is drawn, is incomplete and invalid as a gift if the drawer dies before payment or acceptance;<sup>1</sup> although accompanied by delivery of the drawer's pass-book;<sup>2</sup> and delivery of the donor's own promissory note is equally ineffectual, being, not a gift, but a mere promise to give, invalid for want of a consideration.<sup>3</sup> But the maker's own promissory note for which *some* consideration exists, as where a brother gave to his sister, who had nursed him through a severe illness, a sealed envelope, with a memorandum indorsed upon it to the effect that it was not to be unsealed while he lived and that it should be returned to him at any time he wished it, and which, remaining in her possession and being opened after his death, was found to contain his note to her order for \$10,000, in consideration of the services rendered by her, is valid and enforceable.<sup>4</sup> In such cases it is not a gift at all, either *inter vivos* or *causa mortis*, but payment of a debt, measured by the debtor himself; and, though the measure be a liberal one, it will not be interfered with.<sup>5</sup> It is not sufficient, however, that a consideration existed for which the note *might* have been given; it is essential that it should have been, in some part, the consideration for which it was in fact given.<sup>6</sup>

The second innovation upon the simplicity of the early rule of the common law that there could be no valid gift without delivery to the donee of the subject matter of the gift, is more radical. That rule, as stated above, insists that the delivery must be actual, so far as the subject is capable of delivery, and that it must be the true and effectual method of obtaining the command and dominion of the subject. In the case of equitable assignments, this rule is relaxed, not so far as to dispense with delivery, but sufficiently to make delivery of the mere evidence of a right, as in the case of an unindorsed promissory note, bond, savings bank pass-book, and the like, without transfer of the legal title, effectual to vest in the donee, where accompanied by a sufficient declaration of intention to give, the equitable or beneficial interest in the thing intended to

<sup>1</sup> *Simmons v. Cincinnati Savings Bank*, 31 Ohio St., 457.

<sup>2</sup> *Basket v. Hassell*, 107 U. S., 602 and citations.

<sup>3</sup> *Ibid.*; *Starr v. Starr*, 9 Ohio St., 75; *Helfenstein's Estate*, 77 Pa. St., 328; S. C., 18 Am. Rep., 449.

<sup>4</sup> *Worth v. Case*, 42 N. Y., 362; *Dean v. Carruth*, 108 Mass., 242.

<sup>5</sup> See *Ibid.*

<sup>6</sup> *Warren v. Durfee*, 126 Mass., 338.

be given. But in the case of gifts operating under the theory of donative trusts, delivery disappears altogether, the donor retaining the possession as trustee for the beneficiary, under a trust either expressly declared or raised by implication from the circumstances. Such trusts appear to be divided into two classes, namely: first, where the declaration of a present intent to give is accompanied with a purpose on the part of the donor, either expressed in terms or otherwise clearly manifested, to retain possession as trustee for the donee; and, secondly, where the declaration of a present intent to give has assumed an executed form, which, though unaccompanied by delivery, may yet in itself be regarded as evidence of intention upon the part of the donor to retain as trustee for the beneficiary. Cases falling within the first of these classes, all the authorities agree, constitute valid and enforceable, though gratuitous, trusts. In regard to the second class, there is considerable diversity of opinion, with perhaps the weight of the latest authorities against it.

And, first, of gifts effective without delivery, upon the ground of a declared or sufficiently manifested intention upon the part of the donor to retain the possession as trustee for the donee.

The distinction upon which the validity of this class of gifts is maintained is that while a voluntary *contract* is not enforceable, yet where an actual *trust*, though voluntary, has been created, it will be enforced.<sup>1</sup> The English authorities will be found collected and reviewed, and the rules illustrated by a variety of cases, in the well considered case of *Kekewich v. Manning*;<sup>2</sup> and the doctrine is one of frequent application in the courts of the United States.

Thus, where one deposited money in bank in her own name as trustee for another, declared that she had deposited it for him, and subsequently spoke of it as belonging to him, but afterwards drew it out and applied it to her own use, it was held that there was a completed gift, for which the estate of the donor was liable to the donee;<sup>3</sup> and where a stepfather deposited money in bank in his own name as trustee for his stepdaughter, giving her the deposit book, which, however, was returned to him and remained in his possession until his death, it was held that there was a completely constituted trust, and that its voluntary or gratuitous character was

<sup>1</sup> *Pulvertoft v. Pulvertoft*, 18 Ves., 84; *Ex parte Pye*, 18 Ves., 140.

<sup>2</sup> 1 DeG., M. & G., 176.

<sup>3</sup> *Minor v. Rogers*, 40 Conn., 512.; s. c., 16 Am. Rep., 69.

no ground for denying relief in a suit by the stepdaughter against the administrator.<sup>1</sup>

The rule in equity against aiding volunteers and enforcing nude pacts does not apply to the case of a *cestui que trust* claiming as against a trustee, since what equity considers a trust may unquestionably be created gratuitously, and the absence of a consideration in such cases is, in general, wholly immaterial;<sup>2</sup> so where one deposited money in her own name "in trust for" another, declaring at the time that she wished the account to be in trust for the party named, but retained the pass-book until her death, the transaction was construed to be equivalent to the declaration, "I have deposited this money for the benefit of the plaintiff, and hold the same as trustee for her."<sup>3</sup> Similar circumstances have been held not to constitute a valid donative trust in Massachusetts,<sup>4</sup> unless the fact of the intended benefit has been communicated to, and accepted by, the *cestui que trust*,<sup>5</sup> though, elsewhere, it is held that such acceptance, being for the donee's benefit, must be presumed in the absence of contrary testimony.<sup>6</sup> The declaration of intention to hold as trustee does not necessarily require the employment of the terms "trust," "trustee," or the like; it is sufficient if manifested by either words or acts admitting of no other interpretation than that the legal possession or right retained is held in trust for the donee;<sup>7</sup> for example, where a husband, holding in his hands certain funds of the wife, informed her that he had added \$3000 thereto, and credited her with that amount, and periodically thereafter with the interest thereon, on his books, the transaction, though not a debt, was held to constitute a valid gift accompanied by an express trust, enforceable against the husband's estate.<sup>8</sup>

<sup>1</sup> *Ray v. Simmons*, 11 B. I., 266: see s. c., and note, 23 Am. Rep., 447, 451.

<sup>2</sup> *Kekewich v. Manning*, 1 DeG., M. & G., 189, 190.

<sup>3</sup> *Martin v. Funk*, 75 N. Y., 134; s. c., 31 Am. Rep., 446.

<sup>4</sup> *Brabrook v. Five Cent Savings Bank*, 104 Mass., 228; s. c., 6 Am. Rep., 222; *Clark v. Clark*, 108 Mass., 522.

<sup>5</sup> *Gerrish v. Bedford Institution*, 128 Mass., 159; s. c., 35 Am. Rep., 365.

<sup>6</sup> *Blaisdell v. Locke*, 52 N. H., 238, 244; and see *Martin v. Funk*, *supra*; *Ex parte Pye*, 18 Ves., 140.

<sup>7</sup> *Kekewich v. Manning*, *supra*; *Heartley v. Nicholson*, 44 L. J., Ch. App., N. S., 277; *Young v. Young*, 80 N. Y., 422; s. c., 36 Am. Rep., 634.

<sup>8</sup> *Crawford's Appeal*, 61 Pa. St., 52; and see, also, upon cases of this class, *Fulton v. Fulton*, 48 Barb., 581.

The second class of donative trusts consists of cases in which there is an executed or completed declaration of intention to make a present gift, unaccompanied by delivery, from the mere fact of which, as a matter of law, an intention to hold in trust is presumed, or else a trust relation is created, without any actual expression of such intention on the part of the donor, either by words or acts. Thus in *Morgan v. Malleson*,<sup>1</sup> the memorandum, "I hereby give and make over to M., an India bond, value 1000l.," signed and delivered to M., the donor, however, retaining the bond until his death, which occurred more than a year afterwards, was adjudged equivalent to a declaration of trust in favor of M., entitling him to both the bond and all the interest accrued thereon. So in *Richardson v. Richardson*,<sup>2</sup> a voluntary deed assigning to the grantee, in addition to certain specific property, all other personal property of the grantor, passed certain promissory notes owned by the grantor at the date of the deed, though not indorsed or delivered by her, on the principle that the deed operated as a complete declaration of trust by the grantor of all her property in favor of the grantee, the court declaring, upon its construction of the case of *Kekewich v. Manning*,<sup>3</sup> that "an instrument executed as a present and complete assignment, not being a mere covenant to assign at a future day, is equivalent to a declaration of trust." A gift by deed, which the grantor retained in his possession, of the furniture in a certain house to his natural daughter and her mother, there being no delivery of either the deed or the furniture, was held by Chancellor Kent to create a trust and transfer the specified interest.<sup>4</sup> So where delivery of a certificate of stock in a corporation was made as a gift, the stock, however, under the charter of the company, being transferable only at its office by the person named in the certificate or his attorney and upon surrender thereof, it was held that, while an assignment not executed in the manner required does not alter the relations between the assignor and the other stockholders, the beneficial interest may be transferred by any agreement binding between the parties, and that a trust is thus created which will be enforced by a court of equity.<sup>5</sup>

<sup>1</sup> L. R., 10 Eq., 475.

<sup>2</sup> L. R., 8 Eq., 686.

<sup>3</sup> 1 DeG., M. & G., 176.

<sup>4</sup> *Bunn v. Winthrop*, 1 Johns. Ch., 329.

<sup>5</sup> *Reed v. Copeland*, 50 Conn., 472; s. c., 47 Am. Rep., 663; see, also, *Stone v. Hackett*, 12 Gray, 227; and see *Cushman v. Thayer Mfg. Co.*, 76 N. Y., 365;

But, as indicated above, the authorities are by no means agreed as to the correctness of the proposition upon which this latter class of gratuitous trusts is founded, namely, that a manifestation or expression of intent to give, unaccompanied by delivery, but amounting, in form, to a present and complete assignment, is equivalent to a declaration of trust; and there is a strong current of later and ably reasoned decisions against it. Indeed, without a clearly manifested and complete present intent to give, delivery itself, as we have before seen, is ineffectual to transfer the title; and to hold that such an intent, so manifested, of itself converts the donor into a trustee of the property for the benefit of the donee, would certainly seem to involve the consequence that every attempted gift, ineffectual at law for want of delivery, is nevertheless valid in equity upon the theory of a constructive trust, and thus, for all practical purposes, to abolish delivery altogether as an essential requisite to the validity of gifts. Under conditions of fact almost or quite precisely similar to the example given in the preceding paragraph of an attempted gift of corporate stock, legally transferable only on the books of the company, it has accordingly been held repeatedly, both in England and America, that the transaction was legally insufficient either to constitute a gift or to establish a trust.<sup>1</sup> In one of the cases referred to, it is said that if the donor had declared that he held, or that he would thenceforth hold, the shares of stock in trust for the donee, equity would perhaps seize upon and enforce the trust for the latter's benefit; but that, in the case before the court, the assignment professed to convey the stock absolutely, and was inconsistent with any idea of a trust in favor of the donee.<sup>2</sup> The true distinction is declared to be plain and beyond dispute, namely, that, for a man to make himself trustee, there must be in some way an expression of an intention to become a trustee, whereas words of present gift show an intention to give over property to another, and not to retain it in the donor's own hands for any purpose, fiduciary or otherwise.<sup>3</sup> Where a

where, however, the doctrine of trusts is not invoked; see, also, *Helfenstein's Estate*, 77 Pa. St., 328; s. c., 18 Am. Rep., 449.

<sup>1</sup> *Moore v. Moore*, L. R., 10 Fq., 474; *Heartley v. Nicholson*, L. R., 19 Eq., 233; *Balto. Retort, etc. Co. v. Mali*, 65 Md., 93; s. c., 57 Am. Rep., 304.

<sup>2</sup> *Balto. Retort, etc. Co. v. Mali*, *supra*.

<sup>3</sup> *Richards v. Delbridge*, L. R., 18 Eq., 11, 15.

trust was not in fact the thing contemplated, the court will not impute a trust; and *Morgan v. Malleson*<sup>1</sup> and *Richardson v. Richardson*,<sup>2</sup> *supra*, are declared to be now placed among the overruled cases;<sup>3</sup> if right, there never could be a case where the expression of a present gift would not amount to an effectual declaration of trust, nor an intended gift, expressed in writing, defective for want of delivery, which could not be sustained as a declaration of trust.<sup>4</sup> The fact that the donor attempted to make a gift, and failed, raises no presumption that he intended to establish a trust; the latter cannot be inferred from a radical imperfection in the former.<sup>5</sup>

In *Cumber v. Wane*,<sup>6</sup> and in numerous decisions following that case, it is declared that payment of a part of a debt cannot extinguish the whole, though it be so agreed between the parties and a receipt in full be given by the creditor to the debtor. The law, which in general leaves it to the parties to determine the values of the mutual considerations upon which their contracts are founded, makes an exception in the case of money, which is the legal measure of all values; and, where the contract is either to give or to surrender a large sum for a small one, except in the case and to the extent of legal interest upon loans or the like, adjudges the contract invalid as to the disparity for want of a sufficient consideration, and allows the creditor, notwithstanding the receipt, unless it be an acquittance under seal, to recover so much of his debt as remains in fact unpaid. The doctrine of these cases, though it has not escaped some criticism,<sup>7</sup> is undisputed; but a just distinction seems now to be established between such partial relinquishment or unsealed release of debts by way of stipulation or contract between the parties, and purely voluntary donations by the creditor of either the whole or any part of his debt, making the latter valid when accompanied by such delivery, or acts in the

<sup>1</sup> L. R., 10 Eq., 475.

<sup>2</sup> L. R., 3 Eq., 686.

<sup>3</sup> *Young v. Young*, 80 N. Y., 422; s. c., 36 Am. Rep., 634.

<sup>4</sup> *Ibid.*, and citations.

<sup>5</sup> *Marcy v. Amazeen*, 61 N. H., 131; and see *Antrobus v. Smith*, 12 Ves., 39, 43; *Meeks v. Kettlewell*, 1 Hare, 464; s. c., 1 Ph., 342; *Milroy v. Lord*, 4 DeG., F. & J., 264; *Brunn v. Schuett*, 59 Wis., 261; s. c., 48 Am. Rep., 499; *Gardner v. Merritt*, 32 Md., 78; *Taylor v. Henry*, 48 Md., 550; *Fulton v. Fulton*, 48 Barb., 591.

<sup>6</sup> 1 Strange, 426; and see, s. c., Sm. Lead. Cas., 9th Am. ed., 606.

<sup>7</sup> See *Leddel v. Starr*, 5 C. E. Green, 274.



nature thereof or equivalent thereto, as the subject matter may admit. In some cases, the upholding of such gift is treated as if peculiar to courts of equity,<sup>1</sup> while in others the result has been reached by somewhat curious, not to say far-fetched, processes of reasoning. Thus, where a creditor, having repeatedly declared her desire not to require payment, subsequently paid certain debts due from herself to the debtor as against which, had she desired, she could have treated his debt to her as a set-off, and which, therefore, she might be said not really to have owed him, the amount so paid, unnecessarily, by her to him was ingeniously treated as the gift; or, in other words, the debtor's claim against the creditor was virtually treated as having been actually set-off, and her payment of the amount which she, therefore, might have retained, was treated as the gift.<sup>2</sup> There can, however, be no meritorious reason why there may not be as valid a gift, at law as well as in equity, of a sum of money, represented by a debt from the donee to the donor, as there might be of the same if it were in any other form; and, if there be a delivery *secundum subjectam materiam*, in so far as the subject matter will admit of delivery, such is the present state of the authorities. Thus where the creditor proposed to give the debtor the amount due, \$821.90, but, for the professed purpose of making the transaction, as they supposed, valid in law, the debtor paid the creditor one dollar, which the latter credited upon his books, and then made an entry, "Gift to balance account, \$820.90," at the same time giving the former a receipt in full, but afterwards sued at law to recover the amount left actually unpaid, the court, recognizing it to be the uniform doctrine of the authorities that payment of a less sum is no discharge of a larger, admittedly due, although agreed to be so received, held the transaction to be a valid gift. The dollar was given, not in payment of the larger sum due, but, as was supposed, to give validity to the intended discharge. The plaintiff balanced his books by gift to the defendant, and, although this alone would not have constituted a valid gift for want of delivery, yet the added receipt in full, being the only delivery the subject matter was susceptible of, operated as an

<sup>1</sup> *Eden v. Smyth*, 5 Ves., 351; *Astor v. Pye*, *Ibid.*, 350, note; *Flower v. Marten*, 2 Myl. & Cr., 459; *Yeomans v. Williams*, L. R., 1 Eq. Cas., 184; *Toner v. Taggarts*, 5 Binn., 490; *Leddel v. Starr*, *supra*; but see *Cross v. Sprigg*, 6 Hare, 552.

<sup>2</sup> *Strong v. Bird*, L. R., 18 Eq., 315.

assignment to the defendant, and perfected the gift.<sup>1</sup> So where the payee destroyed the maker's notes, then and afterwards declaring that she did so because she did not wish that he should be required to pay them, there was a valid gift of the debt which they represented, the destruction of the notes, in connection with the declared intent, constituting a sufficient delivery;<sup>2</sup> though intent to give and instructions to cancel or surrender notes, not followed by actual cancellation or delivery of them, have been held insufficient, though accompanied by repeated refusals to receive payment and statements that the debt was satisfied.<sup>3</sup> Mere indorsements of partial credits upon notes or mortgages, intended as gifts to the makers or mortgagors, have been sustained as valid, upon the ground that no delivery in aid of the gift is possible in such cases;<sup>4</sup> and, on the other hand, receipts for parts of the note or mortgage debt have in like manner been upheld as valid gifts, without corresponding indorsements upon the securities in question, although such indorsements were called for or promised in the receipts.<sup>5</sup> Due execution of a formal release of a debt, without delivery, as where a father executed and placed in his safe a release of a note and mortgage given him by his daughter, is ineffectual either as a gift or upon the theory of a trust.<sup>6</sup> *Champney v. Blanchard*,<sup>7</sup> to the effect that a debt may be validly given by the creditor to the debtor by delivery of the evidence of the debt, without any formal release or acquittance, is, though an *obiter dictum*, doubtless correct.

Executory promises to give to charitable or public enterprises are enforceable in three classes of cases, namely; first, where several persons unite in such subscriptions, each being induced to do so, either in fact or by legal construction, by the action of the others; secondly, where acts are done or liabilities incurred upon the faith of such subscriptions, before notice of the withdrawal of the same; and, thirdly, where duties are undertaken or responsibilities

<sup>1</sup> *Gray v. Barton*, 55 N. Y., 68; s. c., 14 Am. Rep., 181.

<sup>2</sup> *Darland v. Taylor*, 52 Iowa, 503; s. c., 35 Am. Rep., 285.

<sup>3</sup> *In re Campbell*, 7 Pa. St., 100; *McGuire v. Adams*, 8 *Ibid.*, 286; and see, for authorities *pro* and *con* on validity of parol releases of negotiable paper, *Foster v. Dawber*, 6 Ex. R., 839, and note to Am. Reprint.

<sup>4</sup> *Green v. Langdon*, 28 Mich., 221.

<sup>5</sup> *Carpenter v. Soule*, 88 N. Y., 251.

<sup>6</sup> *Brunn v. Schuett*, 59 Wis., 261; s. c., 48 Am. Rep., 499

<sup>7</sup> 39 N. Y., 111.

assumed by others on the faith of such promises, as, for example, where the trustees of a theological seminary, before notice of withdrawal or revocation by death, accept the subscriber's promissory note for a sum of money, the principal of which they are to preserve intact, applying the income annually to the purchase of books for the library.<sup>1</sup> The liability in such cases, however, arises from the law of contracts and not from that of gifts; the mutuality of the promises in the first class of cases, the liabilities incurred in the second and the duties assumed in the third, being treated as valuable considerations for the subscription or promise given.<sup>2</sup> And, resting upon contract, if the conditions upon which such subscriptions are made are varied without the consent of the proposed contributors, or are not performed, the obligation to contribute is discharged.<sup>3</sup> So a subscription, though with others, for the benefit of a contemplated association not yet in existence, is revocable by the party, and is revoked by his death, before the association is formed and the promise accepted,<sup>4</sup> the rules governing the validity and enforceable character of contracts being generally applicable to all cases of this character.

Sealed voluntary obligations present another class of cases which, though sometimes treated in connection with the subject of gifts, are properly referable to that of contracts, being enforceable, according to some of the authorities, upon the theory that the seal conclusively imports a consideration;<sup>5</sup> while others place their enforceable character upon the ground that no consideration is required to support a contract under seal, the solemnity of its execution dispensing with that essential requirement of simple contracts, in analogy to the *legitimæ conventiones* of the civil law.<sup>6</sup> It is only as contracts that such instruments are of force; thus a voluntary promise under seal to create, *in futuro*, a trust, however binding as a covenant at law, is no more enforceable in equity than a

<sup>1</sup> See *Farmington Academy v. Allen*, 14 Mass., 172; s. c., 7 Am. Dec., 201; *Bryant v. Goodnow*, 5 Pick., 228; *Watkins v. Eames*, 9 Cush., 539; *Mirick v. French*, 2 Gray, 420; *Helfenstein's Estate*, 77 Pa. St., 328; s. c., 18 Am. Rep., 449.

<sup>2</sup> See 2 Bl. Com., 441, 442.

<sup>3</sup> *Am. Printing House v. La. Board of Trustees*, 104 U. S., 711.

<sup>4</sup> *Phipps v. Jones*, 8 Harris (20 Pa. St.), 260; s. c., 59 Am. Dec., 708.

<sup>5</sup> 2 Bl. Com., 446; *Page v. Trufant*, 2 Mass., 162; s. c., 3 Am. Dec., 41.

<sup>6</sup> See *Chitty on Contracts*, 4 *et seq.*; *Pollock on Contracts*, 119 *et seq.*

similar promise contained in an unsealed writing would be, though, as we have seen *supra*, a voluntary present or created trust is enforceable, whether with or without a seal.<sup>1</sup>

According to the English and some of the American authorities, if confidential relations exist between the donee and the donor of a character to create, either actually or constructively, a probability of inequality, or subordination of the latter to the former, as in case of father and child, guardian and ward, attorney and client, trustee and *cestui que trust*, and the like, gifts from the weaker to the stronger will be set aside without either averment or proof of actual fraud or undue advantage, the burden of proof resting on the donee in such cases to show that the gift was the free, voluntary and intended act of the donor, unaccompanied by force, fraud, undue influence or over persuasion.

Other American authorities, however, including the Supreme Court of the United States, hold that, while gifts between persons so circumstanced are to be closely and jealously scrutinized, and set aside where any improper advantage has been taken,<sup>2</sup> the mere existence of relationship, as of that between parent and child, for example, creates no presumption of unfair advantage, and the burden of proving fraud, undue influence or unfair dealing rests upon him who alleges it.<sup>3</sup> The validity or binding character of gifts from parent to child has already been considered.<sup>4</sup> The legal unity of husband and wife at common law renders gifts between them impossible at law; but, where the husband is in a position to make a gift of property to the wife, and distinctly separates it from the mass of his property for her use, equity will sustain the gift, although no trustee has been interposed.<sup>5</sup> And where a husband verbally gave a mare to his wife, so informed his hostler, and thereupon ceased to drive her, the mare thereafter being known in the family as the wife's, though remaining in the husband's stable, attended by his hostler, and fed, shod and trained at his expense, there was held to have

<sup>1</sup> *Kekewich v. Manning*, 1 DeG., M. & G., 188; *Dennison v. Goehring*, 7 Barr, 175, 178; and see 1 Lead. Cas. Eq., 1.

<sup>2</sup> *Taylor v. Taylor*, 8 How., 183.

<sup>3</sup> *Jenkins v. Pye*, 12 Pet., 241; *Tenbrook v. Brown*, 17 Ind., 410.

<sup>4</sup> *Supra*, p. 61.

*Wallingsford v. Allen*, 10 Pet., 583; *Jones v. Clifton*, 101 U. S., 225; *Stewart v. Platt*, *Ibid.*, 731, 741.

been a valid gift.<sup>1</sup> Nor, in case of subsequent divorce between them, has the court any power to restore to the husband any part of the property given by him to the wife during their marriage, at least if, in the divorce suit, he is the offending party.<sup>2</sup>

There remains to be considered, under the head of gifts as a means of transferring the title to personal property, a class of them, formerly much discussed and still not without importance, namely, gifts *causa mortis*. These are said to be a sort of off-shoot of the right to make oral testaments of chattels, enjoyed at common law, which has survived the statutory prohibition of verbal wills.<sup>3</sup> To be valid, a *donatio causa mortis* must be made by the donor in expectation of death from a present illness, or from a present, external and apprehended peril,<sup>4</sup> and death must accordingly ensue of the particular ailment or peril<sup>5</sup> without revocation;<sup>6</sup> the gift must be conditioned to take effect only upon the death of the donor, from his then existing disorder or apprehended peril;<sup>7</sup> and it is revoked by the death of the donee in the lifetime of the donor.<sup>8</sup> The conditions attending such gifts, however, namely, that the donor may revoke them, and that they are revoked by his recovery or by the predecease of the donee, need not be expressed, being always implied.<sup>9</sup> Differing from gifts *inter vivos* only in the foregoing particulars,<sup>10</sup> they are in other respects, such as the necessity of delivery, the subject-matter susceptible of being so given, and the like, governed by the rules applicable to gifts generally, above discussed, and do not therefore require, in these respects, a separate consideration. They are unlike legacies in that delivery is essential, and the donee's possession must continue during the donor's life, recovery of pos-

<sup>1</sup> *Armitage v. Mace*, 96 N. Y., 528; and see *Crawford's Appeal supra*.

<sup>2</sup> *Jackson v. Jackson*, 91 U. S. 122.

<sup>3</sup> 4 Kent Com., 516; *Dresser v. Dresser*, 46 Me., 48.

<sup>4</sup> *Edwards v. Jones*, 1 Myl. & Cr., 228, 233; *Taylor v. Henry*, 48 Md., 550; s. c., 30 Am. Rep., 486; *Champney v. Blanchard*, 39 N. Y., 11; *Grymes v. Hone*, 49 N. Y., 17; s. c., 10 Am. Rep., 313.

<sup>5</sup> *Grymes v. Hone supra*; *Weston v. Hight*, 17 Me., 287; s. c., 35 Am. Dec., 250; *Irish v. Nutting*, 47 Barb., 370.

<sup>6</sup> *Champney v. Blanchard supra*; *Taylor v. Henry supra*.

<sup>7</sup> *Kiff v. Weaver*, 94 N. C., 274; s. c., 55 Am. Rep., 601.

<sup>8</sup> *Basket v. Hassell*, 107 U. S., 602; *Parker v. Marston*, 27 Me., 196.

<sup>9</sup> *Emery v. Clough*, 63 N. H., 552; s. c., 56 Am. Rep., 543.

<sup>10</sup> *Dresser v. Dresser supra*; *Basket v. Hassell supra*; *Walter v. Ford*, 74 Mo., 195; s. c., 41 Am. Rep., 312; *Newton v. Snyder*, 44 Ark., 42; *Coleman v. Parker*, 114 Mass.,

session by the latter revoking the gift; the title passes directly from the donor to the donee, and not through the personal representative, or requiring his consent; they are not subject to probate, nor to contribution with legacies in case of the insufficiency of assets, nor to any of the incidents of administration, their liability for debts upon failure of assets standing upon the same ground with that of gifts *inter vivos*; they are not revocable by will, which operates only upon the testator's decease, while such gifts take effect by relation from the time of delivery; and, unlike testaments, they, like contracts, depend for their validity upon the law of the place where they are made, and not upon that of the donor's domicile.<sup>1</sup> If needed to pay debts, the weight of authority seems to be that the administrator may sue to recover gifts, both *causa mortis* and *inter vivos*,<sup>2</sup> although it has been held that in the latter class, though not in the former, the administrator is estopped by the act of his intestate, and the creditors, personally, must attack the transaction.<sup>3</sup> It is difficult to assign a satisfactory reason for any distinction between the two classes of gifts in this respect. Not only is the donee required to see that the donor's debts are paid,<sup>4</sup> but the gift may be coupled with a binding trust; as, for example, where the gift was of a savings bank-book, with instructions to bury decently and erect a headstone over the donor, retaining any surplus which might be left.<sup>5</sup> But, like both contracts and gifts *inter vivos*, if either the beneficiaries, or their respective proportions, are not expressed with clearness, such gifts fail for uncertainty,<sup>6</sup> nor are they to be favored or extended by way of analogy.<sup>7</sup>

2. The next method of alienating chattels personal is by deed. Every deed imports a consideration;<sup>8</sup> for it was anciently sup-

<sup>1</sup> *Emery v. Clough*, *supra*; *Basket v. Hassell*, *supra*.

<sup>2</sup> *Shouler's Ex. & Adm.*, ss. 219-20.

<sup>3</sup> *Burton v. Fairholt*, 86 N. C., 260; *Kiff v. Weaver*, 94 N. C., 274; s. c., 55 Am. Rep., 601.

<sup>4</sup> *Pierce v. Five Cents Saving Bank*, 129 Mass., 425; s. c., 37 Am. Rep., 371.

<sup>5</sup> *Curtis v. Portland Savings Bank*, 77 Me., 151; s. c., 52 Am. Rep., 750; *Hills v. Hills*, 8 M. & W., 401; *Davis v. Ney*, 125 Mass., 590.

<sup>6</sup> *Shеды v. Roach*, 124 Mass., 472; s. c., 26 Am. Rep., 680, and note.

<sup>7</sup> *Gano v. Fisk*, 43 Ohio St., 462; s. c., 54 Am. Rep., 819.

<sup>8</sup> *Sharlington v. Strotton*, Plowd., 308; *Shubrick v. Salmond*, 3 Burr., 1639; 1 Fonb. Eq., 342; 2 Fonb. Eq., 26; *Williams' Real Property*, 118, 2d ed.; 123, 3d & 4th eds.; 128, 5th ed.; 134, 6th ed.; 137, 7th ed.; 144 8th ed.; 6th Am. ed., 120, 121.

posed that no person would do so solemn an act as the sealing and delivery of a deed without some sufficient ground. The presence of this implied consideration renders a deed sufficient of itself to pass the property in goods.<sup>1</sup> It supplies, on the one hand, the want of delivery; and, on the other, the want of that actual consideration which always exists in the third and most usual mode of alienation of chattels personal, namely, by sale; but, as against creditors and subsequent purchasers, the deed, under the registry acts, must be duly recorded.<sup>2</sup>

3. By sale. It is in this last and most usual method of alienation that the contrast presents itself between the means to be employed for the alienation of real property and chattels personal. When a contract has been entered into for the sale of lands, the legal estate in such lands still remains vested in the vendor; and it is not transferred to the vendee until the vendor shall have executed and delivered to him a proper deed of conveyance. In equity, it is true, that the land belongs to the purchaser from the moment of the signature of the contract; and from the same moment the purchase-money belongs, in equity, to the vendor.<sup>3</sup> But at law the only result of the signature of a contract for the sale of lands is that each party acquires a right to sue the other for pecuniary damages, in case such contract be not performed. Not so, however, the case of a contract for the sale of chattels personal. Such a contract immediately transfers the legal property in the goods sold from the vendor to the vendee, without the necessity of anything further.<sup>4</sup> In order to this, it is, of course, necessary that the transaction have within itself all the legal requisites for a sale; and these requisites will accordingly form the next subject for our consideration.<sup>5</sup>

The requisites for the sale of goods partly depend upon their value. Goods under the value of 10*l.* sterling may now be sold in the same manner as goods of whatever value were anciently

<sup>1</sup> Carr v. Burdiss, 1 C., M. & R., 782, 788; s. c., 5 Tyrw., 309, 316.

<sup>2</sup> See *infra* on Sales, p. 80.

<sup>3</sup> Williams' Real Property, 133, 2d ed.; 137, 3d & 4th eds.; 143, 5th ed.; 150, 6th ed.; 153, 7th ed.; 159, 8th ed.; 6th Am. ed., 138.

<sup>4</sup> Com. Dig., tit. Biens (D), 3.

<sup>5</sup> In the recent cases of Thompson v. Pettitt, 10 Q. B., 101 (39 E. C. L.); and Flory v. Denny, 7 Ex. Rep., 581, the property in goods was held to pass by a mere written memorandum by way of mortgage without any delivery; *sed qu.*

saleable; whereas goods of the value of 10*l.* or upwards are now regulated in their sale by an enactment contained in the Statute of Frauds.<sup>1</sup> And, first, with regard to such goods and chattels as do not fall within this enactment, there can be no sale without a tender or part payment of the money, or a tender or part delivery of the goods, unless the contract is to be completed at a future time. Thus if A. should agree to pay so much for the goods, and B., the owner, should agree to take it, and the parties should then separate without anything further passing, this is no sale.<sup>2</sup> But if A. should tender the money, or pay but a penny of it, or B. should tender the goods, or should deliver any of them, even the smallest portion, to A., or if the payment, or delivery, or both, should be postponed by agreement till a future day, the sale will be valid, and the property in the goods will pass at once from the vendor to the vendee.<sup>3</sup> If, however, any act should remain to be done on the part of the seller previously to the delivery of the goods, the property will not pass to the vendee until such act shall have been done. Thus, if goods, the weight of which is unknown, are sold by weight,<sup>4</sup> or if a given weight or measure is sold out of a larger quantity,<sup>5</sup> the property will not pass to the vendee until the price shall have been ascertained by weighing the goods in the one case, or the goods sold shall have been separated by weight or measure in the other. So if an article be ordered to be manufactured, the property in it will not vest in the person who gave the order, until it shall, with his assent, have been appropriated for his benefit.<sup>6</sup> It is not, however, necessary that a price should actually be named. A contract to sell without naming a price is a contract to sell at a reasonable price; and the property in goods may well pass by such a contract.<sup>7</sup> So a contract to sell by weight may pass the property in the goods before they are actually weighed, if such appear to be the intention of the parties.<sup>8</sup>

<sup>1</sup> 29 Car. II., c. 3, s. 17.

<sup>2</sup> 2 Bla. Com., 447; Smith's Mercantile Law, 461, 5th ed.; 488, 6th ed.

<sup>3</sup> Shep. Touch., 224; Martindale v. Smith, 1 Q. B., 389, 395 (41 E. C. L.).

<sup>4</sup> Hanson v. Meyer, 6 East, 614; Swanwick v. Southern, 9 A. & E., 895 (36 E. C. L.).

<sup>5</sup> Busk v. Davis, 2 Mau. & Selw., 397; Shepley v. Davis, 5 Taunt., 617 (1 E. C. L.).

<sup>6</sup> Atkinson v. Bell, 3 B. & C., 277 (10 E. C. L.); Wilking v. Bromhead, 5 M. & G., 963, 973 (44 E. C. L.). <sup>7</sup> Joyce v. Swann, 17 C. B. N. S., 84 (112 E. C. L.).

<sup>8</sup> Turby v. Bates, 2 H. & N., 200.



Sale is a contract for the transfer of the absolute or general property in a thing for a price in money;<sup>1</sup> and while, as stated above, a contract to sell without naming a price is a contract to sell at a reasonable price, yet if the thing is delivered with the express understanding that the price is to be fixed upon afterwards, there is no sale if the parties do not agree.<sup>2</sup> Like all other contracts, it is essential that the minds of the parties meet. Thus where, at an administrator's sale, an old drill machine was sold for fifteen cents, a secret drawer in which was afterwards found to contain a large amount in money and valuables, it was held that only the machine, and not the valuables, was the mutually contemplated subject-matter of the sale, leaving the title to the latter in the administrator;<sup>3</sup> and so where the sale was of damaged flour and, by accident, good flour was placed among the damaged and selected by the proposed vendee, no title passed, the minds not meeting.<sup>4</sup> Upon the same principle, one who sells and delivers goods in expectation of simultaneous payment, either in money or by note, does not agree to part with his goods without such payment, which is, therefore, a condition precedent to the sale; and, if the condition be not forthwith performed after demand, the delivery is inoperative to pass the title, and the vendor may instantly reclaim the property.<sup>5</sup> Where the vendee, after delivery, tendered the vendor the latter's own promissory notes in payment, which he refused to accept, he was held entitled to retake the thing sold.<sup>6</sup> But the right to retake must be promptly exercised,<sup>7</sup> and, if there has been a partial payment, the right can be exercised only after offer to place vendee *in statu quo*, accompanied by demand of the goods, and refusal to surrender them.<sup>8</sup> And where

<sup>1</sup> Wittowsky v. Wasson, 71 N. C., 451.

<sup>2</sup> *Ibid.*

<sup>3</sup> Huthmacher v. Harris's Adm'r., 33 Pa. St., 491; s. c., 80 Am. Dec., 502.

<sup>4</sup> Harvey v. Harris, 112 Mass., 32.

<sup>5</sup> Ferguson v. Clifford, 37 N. H., 86, 103; Bainbridge v. Caldwell, 4 Dana, 213; Paul v. Reed, 52 N. H., 136; Wabash Elevator Co. v. First National Bank, 23 Ohio St., 311; Banendahl v. Horr, 7 Blatch., 548; Hammett v. Limeman, 48 N. Y., 399; Refining Co. v. Miller, 7 Phil'a., 97; Goldsmith v. Bryant, 26 Wis., 34; Harding v. Meitz, 1 Tenn. Ch., 610; Miller v. Jones, 66 Barb., 148; Osborn v. Gantz, 38 N. Y. Sup. Ct., 143; and see Gibson v. Tobey, 46 N. Y., 637.

<sup>6</sup> Allen v. Hatfield, 76 Ill., 353; Miller v. Jones, 66 Barb., 148.

<sup>7</sup> Goldsmith v. Bryant, 26 Wis., 34.

<sup>8</sup> Hamilton v. Singer Mf'g Co., 54 Ill., 370.

the vendee has sold the goods to a *bona fide* purchaser, the right is held to have been lost.<sup>1</sup>

The proposition declared above that there can be no sale without either delivery or payment, in whole or in part, or at least a tender of one or the other, though frequently laid down in the text books, is, in the light of the authorities, much too broadly stated. Independently of the statute of frauds, any words by which the owner consents to sell and the vendee to buy, *in praesenti*, for a specified price, creates a sale, and transfers the right to the chattel on the one side and to the price on the other.<sup>2</sup> As between the parties, as soon as the bargain of sale of specific personal property is struck, if it is unconditional, the contract becomes absolute, without actual payment or delivery, and the risk of accident is with the purchaser.<sup>3</sup> Thus, where slaves were struck off at auction to the highest bidder, and, before either payment or delivery, one of them died, it was held that the loss was the purchaser's, sales of chattels being complete as soon as the parties have agreed to the terms, the vendor thereupon immediately acquiring a right of action for the price, and the vendee an immediate right of action for the thing.<sup>4</sup> As between the buyer and the seller, the title passes without delivery, if such was the intention; and the sale is valid as against all persons other than creditors and subsequent purchasers without notice.<sup>5</sup> But if anything remains to be done when the contract is made, either to determine the identity, the quantity or the price of the thing sold, the contract is executory and title does not pass to the vendee;<sup>6</sup> yet even here the intention of the parties is the controlling

<sup>1</sup> Mich. Central R. R. Co. v. Phillips, 60 Ill., 190; and see Western Trans. Co. v. Marshall, 4 Abb. App. Dec., 575; Goodwin v. Boston R. R. Co., 111 Mass., 487. But see *infra*, pp. 88, 89, Conditional Sales.

<sup>2</sup> De Foncleare v. Shotterkirk, 3 Johns., 170.

<sup>3</sup> Willis v. Willis, 6 Dana, 48; Brown v. Long, 2 Duv., 322; Newcomb v. Cabell, 10 Bush., 468.

<sup>4</sup> Potter v. Coward, 1 Meigs, 22; Sweeney v. Owsley, 14 B. Mon., 412.

<sup>5</sup> Visser v. Webster, 13 Cal., 58; Packard v. Wood, 4 Gray, 310-11; Burt v. Dutcher, 34 N. Y., 493, 496; Sidwell v. Lobly, 27 Ill., 437; M'Coy v. Moss, 5 Port., 88; Meeker v. Wilson, 1 Gall., 419; McCandlish v. Newman, 22 Pa. St., 460; Marshall v. Morehouse, 14 La. Ann., 689; Lanfear v. Sumner, 17 Mass., 110; Hooben v. Bidwell, 16 Ohio, 510; Jenkins v. Jarrett, 70 N. C., 255; Taylor v. 25 Bales of Cotton, 26 La. Ann., 247; Webster v. Granger, 78 Ill., 230.

<sup>6</sup> Hudson v. Wies, 29 Ala., 294; Beller v. Block, 19 Ark., 566; Devane v. Finnell, 2 Ire. Law, 36; Stone v. Peacock, 35 Me., 385; Martin v. Hurlburt, 9 Min.,

consideration, and sale without segregation transfers the property in the thing so sold if both parties so intend.<sup>1</sup> If segregated, though undelivered, "the loss follows the title," and falls on the purchaser in the absence of contrary stipulation, unless it occurs through the vendor's fault.<sup>2</sup> The intention of the parties as to the time when the title shall pass must be manifested, either by the terms or language employed, or by the conduct of the parties when the bargain is made;<sup>3</sup> and, to constitute a valid delivery, the intention to deliver must accompany the act of deposit.<sup>4</sup>

But, as against creditors and subsequent purchasers without notice, it is essential that there be delivery, either actual or symbolical, and an actual change of possession, except where the record or registry system is allowed to constitute a substitute therefor; since personal property, sold but not delivered, remains liable for the vendor's debts, and passes no title as against subsequent purchasers in good faith.<sup>5</sup> If, however, the vendee gains possession before execution or attachment, his title will prevail,<sup>6</sup> if the purchase was made in good faith; but if made with knowledge that the object of the sale was to enable the vendor to hinder, delay or defraud creditors, then, however immediate and complete the delivery, and notwithstanding the actual payment of an adequate price, the sale is void.<sup>7</sup> But a creditor, even with such knowledge, may validly buy the goods of his debtor in satisfaction of his debt.<sup>8</sup> If the vendor retains control of the property, either conjointly with the purchaser, or as his agent or manager of his business, there is not that actual or continued change of possession

132; *Gilman v. Hill*, 36 N. H., 311; *Rapalye v. Mackie*, 6 Cow., 250; *Lester v. McDowell*, 18 Pa. St., 91; *Randolph v. Elliot*, 34 N. J. L., 184.

<sup>1</sup> *Watts v. Hendry*, 13 Fla., 523; *Groat v. Gila*, 51 N. Y., 431; and see *Chapman v. Shepard*, 39 Conn., 413. But see *Gibbs v. Benjamin*, 45 Vt., 124.

<sup>2</sup> *Dexter v. Norton*, 55 Barb., 272; *Browning v. Hamilton*, 42 Ala., 484, 486.

<sup>3</sup> *Foster v. Ropes*, 111 Mass., 10.

<sup>4</sup> *Susquehanna, etc. Co. v. Finney*, 58 Pa. St., 200.

<sup>5</sup> *Archer v. Hubbells*, 4 Wend., 514; *Sawyer v. Nichols*, 40 Me., 212; *Monroe v. Hussey*, 1 Oregon, 188; *Hudnal v. Wilder*, 4 McCord, 294; s. c., 17 Am. Dec., 744; *Barr v. Reitz*, 53 Pa. St., 256; *Lewis v. Swift*, 54 Ill., 436; *Rothchild v. Rowe*, 44 Vt., 389.

<sup>6</sup> *Berry v. Ensell*, 2 Gratt., 333; *Kendall v. Sampson*, 12 Vt., 515.

<sup>7</sup> *Clements v. Moore*, 6 Wall., 299; *Hartshorn v. Eames*, 31 Me., 93.

<sup>8</sup> *Wickham v. Miller*, 12 Johns., 320; *Vance v. Phillips*, 6 Hill (N. Y.), 433.

necessary to give validity to the transaction as against creditors.<sup>1</sup> Where a tenant, still retaining the farm, attempts to transfer personal chattels thereon to his landlord, delivery, either actual or constructive, is necessary,<sup>2</sup> and even a sale of growing corn was held invalid without such delivery;<sup>3</sup> though if the corn so sold be identified, as by cutting off the tops of the stalks, the sale is valid, upon the theory of a constructive delivery.<sup>4</sup> But want of possession raises no presumption of fraud, if, from the circumstances of the case, delivery is not within the power of the parties, as in the case of a ship, or of goods at sea.<sup>5</sup> A sale of personal property by a son-in-law to his father-in-law living in the same house, and kept there for a time, but with intent to remove elsewhere, has been held not to be necessarily invalid.<sup>6</sup> Retention of personal property by the seller has been held to be conclusive evidence of a colorable sale;<sup>7</sup> though by some courts it is declared to create merely a presumption of fact, which may be overborne by other testimony.<sup>8</sup>

Where there has once been a perfected sale, accompanied with notorious and continued change of possession, the vendee may allow the vendor to use the chattel with the same safety as a stranger;<sup>9</sup> yet even in this case it has been held that where the property comes back into the vendor's possession, with no intermediate change of title, a presumption of fraud arises, the burden of disproving which rests on the vendee, and that the length of the interval is immaterial, except as a circumstance for the jury to consider.<sup>10</sup> But a sheriff's sale, made by legal authority, is not invalidated or

<sup>1</sup> *Rothchilds v. Rowe*, *supra*; *Miller v. Garman*, 69 Pa. St., 134; *Massey v. Allen*, 17 Wall., 351.

<sup>2</sup> *Lefevre v. Mires*, 81 Ill., 456.

<sup>3</sup> *Weatherly v. Higgins*, 6 Ind., 74.

<sup>4</sup> *Graff v. Fitch*, 58 Ill., 373; s. c., 11 Am. Rep., 85.

<sup>5</sup> *Conard v. Atlantic Ins. Co.*, 1 Pet., 386.

<sup>6</sup> *Hagarty v. Herbert*, 3 Houst. (Del.), 628; but see *Cannon v. McMichael*, 6 Mackey, 225.

<sup>7</sup> *Hatstat v. Blakeslee*, 41 Conn., 301.

<sup>8</sup> *Cutting v. Jackson*, 56 N. H., 253; *Phillips v. Reitz*, 16 Kan., 396.

<sup>9</sup> *Dewey v. Thrall*, 13 Vt., 281; *Berry v. Ensell*, 2 Gratt., 333; see *Godchaux v. Mulford*, 26 Cal., 316; *Baylor v. Smithers*, 1 Litt., 105; *Hotchins v. Hunt*, 49 Me., 213; *Brooks v. Powers*, 15 Mass., 244; *Adams v. Wheeler*, 10 Pick., 199; *Bissell v. Hopkins*, 3 Cow., 166; *Poole v. Mitchell*, 1 Hill (S. C.), 404; *Allen v. Johnson*, 4 J. J. Marsh., 235; *Sherron v. Humphreys*, 14 N. J. L., 217; *Howell v. Elliott*, 1 Dev., L., 76; *State v. Smith*, 31 Mo., 566; *Allen v. Edgerton*, 3 Vt., 442; *Shaddon v. Knott*, 2 Swan, 358; *Maney v. Killough*, 7 Yerg., 440.

<sup>10</sup> *Tilson v. Terwilliger*, 56 N. Y., 273.

affected by the debtor's continued possession and use after the sale;<sup>1</sup> and a friend of the debtor, after fair purchase at a public sale, may safely leave the goods in the debtor's possession.<sup>2</sup>

Where the chattels sold are already in the possession of the vendee, no useless ceremony of surrender and re-delivery is necessary.<sup>3</sup> If property, which is in possession of a third person at the time, is sold in good faith, notice to such third person is sufficient delivery;<sup>4</sup> but the notice must be given either by the vendee personally, or by some other person than the vendor, and the party in possession must consent to hold for the vendee, or the vendor's creditors may attach.<sup>5</sup> If he does so assent, the vendor may act as the vendee's agent in regard to the property, without affecting his title.<sup>6</sup> If the property is held adversely by a third person, the owner cannot make a valid sale of it, his right or title being a mere *chose in action*, or right to sue, which is not assignable.<sup>7</sup> If the goods are at a distance when the sale is made, an agreement that the vendee may immediately take possession is equivalent to actual delivery, if no laches in taking possession follows.<sup>8</sup> Delivery of a bill of sale will pass the title, where the character or situation of the property does not admit of actual delivery.<sup>9</sup> That an assignment or gift of personal property, though by deed, bill of sale or mortgage duly recorded, will pass the title thereto without delivery, either actual or symbolical, if capable of actual delivery, has been denied by some authorities and left in doubt by others;<sup>10</sup> but, by the weight of authority, the necessity of such delivery is obviated by the record.<sup>11</sup>

<sup>1</sup> *Pierce v. Chipman*, 8 Vt., 338.

<sup>2</sup> *Water v. McClellan*, 4 Dall., 206.

<sup>3</sup> *Nichols v. Patten*, 18 Me., 231; s. c., 36 Am. Dec., 713; *Chapman v. Searle*, 3 Pick., 33; and see *Champney v. Blanchard*, 39 N. Y., 111.

<sup>4</sup> *Pierce v. Chipman*, 8 Vt., 334; *Goodwin v. Kelly*, 42 Barb., 194.

<sup>5</sup> *Pierce v. Chipman*, *supra*; *Dixon v. Buck*, 42 Barb., 70; *Merritt v. Miller*, 13 Vt., 416; *Whitney v. Lynde*, 16 Vt., 579.

<sup>6</sup> *Harding v. James*, 4 Vt., 462.

<sup>7</sup> *Stoddell v. Frigate*, 2 A. K. Marsh., 136; *Young v. Ferguson*, 1 Litt., 298; *London v. Turner*, 11 Leigh, 403; *O'Keefe v. Kellogg*, 15 Ill., 347.

<sup>8</sup> *Patrick v. Meserve*, 18 N. H., 300; and see *Conard v. Atlantic Ins. Co.*, 1 Pet., 336.

<sup>9</sup> *Gibson v. Stevens*, 8 How., 334.

<sup>10</sup> *Burge v. Cone*, 6 Allen, 412; and see *Thomas v. Soper*, 6 Munf., 23; *Stone v. King*, 7 R. I., 353.

<sup>11</sup> *Clary v. Frazer*, 8 G. & J., 393; *Krenzer v. Cooney*, 45 Md., 582; *Thomason v. Dill*, 30 Ala., 444; *Younge v. Moore*, 1 Strobb., 43; *Jaggers v. Estes*, 2 *Ibid.*, 343; *Heine v. Anderson*, 2 Duer, 318.

If no place of delivery be stipulated, goods sold are deliverable at the place where they were at the time of sale, or else at the vendor's place of business.<sup>1</sup> If the vendor is to deliver, he must do so at the vendee's residence<sup>2</sup> or place of business;<sup>3</sup> or, if the articles are cumbrous, he must seek a designation of place by vendee.<sup>4</sup> If the delivery is to be at a future day in a certain city, the vendee is entitled to designate the place of delivery in such city.<sup>5</sup> If the place of delivery is to be designated by the vendee, and he designates none, it is sufficient if the goods are at the vendor's place of business, ready for delivery;<sup>6</sup> while if the place is at the option of the seller, he is bound to give the vendee notice.<sup>7</sup>

Where the goods sold are in the vendor's possession at the time of the sale, a warranty of the title is implied;<sup>8</sup> but if the vendor was not in possession, the rule *caveat emptor* applies, and there is no implied warranty.<sup>9</sup> And although the vendor was in possession, yet if there is a written bill of sale containing no warranty, none, it has been held, can be implied.<sup>10</sup> In sales under execution, there is no such implied warranty.<sup>11</sup>

Warranty of quality presents questions of considerably more intricacy and difficulty. Where the vendee had no opportunity to examine the goods, such warranty is implied.<sup>12</sup> So goods of which the vendor is also the manufacturer carry with them an implied warranty that they shall answer the purpose for which they were made;<sup>13</sup> though where open to inspection, and examined before the

<sup>1</sup> Bailey v. Ricketts, 4 Ind., 488; Bunson v. Gleason, 7 Barb., 472.

<sup>2</sup> La Farge v. Rickert, 5 Wend., 187.

<sup>3</sup> Field v. Runk, 22 N. J. L., 525.

<sup>4</sup> Mallory v. Grant, 4 Chand., 143.

<sup>5</sup> Stillwell v. Bowling, 36 Mo., 310.

<sup>6</sup> Lucas v. Nicholas, 5 Gray, 309.

<sup>7</sup> Rogers v. Van Hoesen, 12 Johns., 220.

<sup>8</sup> Storm v. Smith, 42 Miss., 497; Gross v. Kierski, 41 Cal., 111; Williamson v. Sammons, 34 Ala., 691; Linton v. Porter, 31 Ill., 107; Davis v. Smith, 7 Minn., 414; Chancellor v. Wiggins, 4 B. Mon., 201.

<sup>9</sup> Storm v. Smith, *supra*; Huntington v. Hull, 36 Me., 501; Scranton v. Clark, 39 N. Y., 220.

<sup>10</sup> Sparks v. Messick, 65 N. C., 440; McGraw v. Fletcher, 35 Mich., 104; but see Boothby v. Scales, 27 Wis., 626.

<sup>11</sup> Hensley v. Baker, 10 Mo., 157; Corwin v. Benham, 2 Ohio St., 36.

<sup>12</sup> Moore v. McKinlay, 5 Cal., 471; Getty v. Rountree, 2 Chand., 28.

<sup>13</sup> Beers v. Williams, 16 Ill., 69; Cunningham v. Hall, 1 Sprague, 404; Walton v. Cody, 1 Wis., 420; Brown v. Murphy, 31 Miss., 91; Street v. Chapman, 29 Ind., 142; Field v. Kinnear, 4 Kan., 409.

sale, no such implied warranty results from the fact that the manufacturer was the vendor;<sup>1</sup> nor can such warranty be implied where the article so manufactured and sold was specially ordered by the vendee, though for a special purpose.<sup>2</sup> But a manufacturer selling an article for a particular purpose impliedly warrants it fit for such purpose,<sup>3</sup> nor will a written bill of sale containing express warranties upon certain points exclude the warranty thus implied by law.<sup>4</sup> So, goods sold by sample carry with them an implied warranty that they are equal to the sample in kind and quality,<sup>5</sup> though exhibition of sample at the time of sale does not necessarily amount to a sale by sample.<sup>6</sup> Except in South Carolina, in which State it is a maxim that "a sound price warrants a sound article,"<sup>7</sup> it is a general rule that there is no implied warranty of quality where the vendor was not the manufacturer, and the vendee had equal opportunity to inspect.<sup>8</sup> To this rule, however, there are several exceptions; thus, in executory contracts, differing from executed ones, there is always an implied warranty or obligation that the goods shall be without marked defects;<sup>9</sup> the vendor of an article, bought for a particular purpose, knowing of but not disclosing a secret defect which renders it unsuitable for that purpose, incurs a liability as great as though he had warranted it;<sup>10</sup> merchants selling guano or superphosphates to farmers as a fertilizer have been held to an implied warranty that the articles so sold were merchantable and reasonably suited to the use for which they were sold;<sup>11</sup> and in every sale of provisions for the vendee's own domestic use and consumption, there is an implied warranty that they are sound

<sup>1</sup> Barnett v. Stanton, 2 Ala., 195.

<sup>2</sup> Port Carbon Ins. Co. v. Grover, 68 Pa. St., 149.

<sup>3</sup> Lespard v. Van Kirk, 27 Wis., 152.

<sup>4</sup> Boothby v. Scales, *Ibid.*, 626; but see McGraw v. Fletcher, 35 Mich., 104.

<sup>5</sup> Williams v. Spofford, 8 Pick., 250; Andrews v. Kneeland, 6 Cow., 354; Rose v. Beatie, 2 Nott & McC., 538; McGee v. Billingsley, 3 Ala., 679.

<sup>6</sup> Gunther v. Atwell, 19 Md., 157; Beirne v. Dord, 5 N. Y., 95.

<sup>7</sup> Barnard v. Yates, 1 Nott & McC., 142; Colcock v. Reid, 3 McCord, 513.

<sup>8</sup> Deming v. Foster, 42 N. H., 165; Bartlett v. Hoppock, 34 N. Y., 118; Kohl v. Lindley, 39 Ill., 195; Moses v. Mead, 1 Denio, 378; Johnson v. Cope, 3 H. & J., 90; Mixer v. Coburn, 11 Metc., 559; Hadley v. Clinton etc., Co., 13 Ohio St., 502; Eagan v. Call, 34 Pa. St., 236; Caldwell v. Smith, 4 Dev. & B., L., 64.

<sup>9</sup> McClung v. Kelley, 21 Iowa, 508; Hamilton v. Ganyard, 34 Barb., 204.

<sup>10</sup> Maynard v. Maynard, 49 Vt., 297.

<sup>11</sup> Gammell v. Gumby, 52 Ga., 504; Wilcox v. Hall, 53 *Ibid.*, 635.

and wholesome; though the rule is otherwise in the case of provisions sold by the quantity as merchandise to be sold again.<sup>1</sup> Warranty, whether express or implied, does not extend to obvious, visible defects,<sup>2</sup> unless art is used to conceal them,<sup>3</sup> or there was no opportunity for inspection.<sup>4</sup> If there be a fraudulent concealment of a defect known to the vendor, and not discoverable by ordinary care and inspection, the vendee may avoid the sale;<sup>5</sup> but defects which are so discoverable will not have that effect, where no deception is employed.<sup>6</sup> The seller may let the buyer cheat himself *ad libitum*, but must not actively assist him in doing so.<sup>7</sup>

Perhaps the most difficult question upon the subject of sales, and the one upon which it is least possible to reconcile the authorities, is as to the effect of statements or representations made by one of the parties, not in terms purporting to be warranties, but confided in or relied upon by the other party to the contract. A leading rule upon the subject, conceded by all the authorities, though much more restricted in its application in some courts than in others, is embodied in the maxim, *simplex commendatio non obligat*; merely praising one's goods, though in particulars and to an extent which their merits may by no means justify, creates no obligation.<sup>8</sup> An affirmation, to constitute a warranty, must appear to have been so intended, and not to be a mere matter of judgment or opinion.<sup>9</sup> In *Ellis v. Andrews*,<sup>10</sup> it is declared that false statements as to the value of the property, though made to obtain a higher price than it is worth, will not sustain an action for fraud,

<sup>1</sup> *Devine v. McCormick*, 50 Barb., 116; *Good v. Johnson*, 6 Heisk., 340; *Ryder v. Neitze*, 21 Minn., 70; U. S. Dig. Title "Sales," s. 1014 and citations.

<sup>2</sup> *Hudgins v. Perry*, 7 Ire., L., 102; *Hill v. North*, 34 Vt., 604; *Williams v. Ingram*, 21 Texas, 300.

<sup>3</sup> *Chadsey v. Greene*, 24 Conn., 562.

<sup>4</sup> *Overby v. Lighty*, 27 Ind., 27; *Hanks v. McKee*, 2 Litt., 227; s. c., 13 Am. Dec., 265.

<sup>5</sup> *Bigler v. Flickinger*, 55 Pa. St., 279; *Turner v. Higgins*, 14 Ark., 21; *Hanks v. McKee*, *supra*; *Patterson v. Kirkland*, 34 Miss., 423.

<sup>6</sup> *Dillard v. Moore*, 7 Ark., 166; *Pearce v. Blackwell*, 12 Ire., L., 49.

<sup>7</sup> *Armstrong v. Bufford*, 51 Ala., 410; *Biggs v. Perkins*, 75 N. C., 397.

<sup>8</sup> *Benj. on Sales*; *Tewkesbury v. Bennett*, 31 Iowa, 83; *McGrew v. Forsythe*, *Ibid.*, 179; *Byrne v. Jansen*, 50 Cal., 624.

<sup>9</sup> *Horton v. Green*, 66 N. C., 596; *Hawkins v. Pemberton*, 51 N. Y., 198; and see *Polhemus v. Heriman*, 45 Cal., 573; *Reed v. Hastings*, 61 Ill., 266.

<sup>10</sup> 56 N. Y., 83; s. c., 15 Am. Rep., 379, and note.



it being the duty of the purchaser to rely upon his own judgment as to value; while in Illinois it has been held that the purchaser of a physician's practice under a false representation that it was worth from \$3500 to \$6000 per annum, could not maintain an action against the seller.<sup>1</sup> On the other hand, it has been held that positive, unequivocal representations, amounting, not to mere expressions of opinions, but to actual affirmation, enter into and form a part of the contract of sale.<sup>2</sup> Thus a vendor, falsely representing a horse to be sound so far as he knew, was held liable to the vendee in damages;<sup>3</sup> and a vendor declaring at the time of sale that a horse is fourteen years old impliedly contracts that he is not older;<sup>4</sup> and statements by a vendor of mining stock as to the amount and quality of the ore taken, the abundance of wood and water and their proximity to the mine, etc., were held not to be mere matters of opinion upon which the vendee has no right to rely, but representations entering into the contract.<sup>5</sup> The authorities agree, however, that, to affect the transaction, the representations must not only have been made by one of the parties, but must have been confided in and relied upon by the other.<sup>6</sup> The effect of such representations, where all the conditions concur which are necessary to give them a legal effect, is, in like manner, a ground of difference; some of the authorities treating them as warranties,<sup>7</sup> while others regard them rather as grounds for avoiding the sale,<sup>8</sup> or for an action for deceit;<sup>9</sup> and some, indeed, expressly declare that a transaction cannot be treated as a warranty and at the same time as a fraud, the former resting in contract, while fraudulent representations contain no element of contract, but are to be classed wholly

<sup>1</sup> Noetling v. Wright, 72 Ill., 390.

<sup>2</sup> Carter v. Black, 46 Mo., 384; Richardson v. Grandy, 49 Vt., 22; and see Brown v. Tuttle, 66 Barb., 169; Duffany v. Ferguson, 66 N. Y., 482.

<sup>3</sup> Jones v. Edwards, 1 Neb., 170.

<sup>4</sup> Burge v. Stroberg, 42 Ga., 89.

<sup>5</sup> Gifford v. Carvill, 29 Cal., 589.

<sup>6</sup> Carter v. Black, *supra*; Hawkins v. Pemberton, *supra*; Polhemus v. Heriman, *supra*; Reed v. Hastings, *supra*; and see Gregory v. Schoenell, 55 Ind., 101.

<sup>7</sup> Carter v. Black, *supra*; Burge v. Stroberg, *supra*; Reed v. Hastings, *supra*; Hawkins v. Pemberton, *supra*.

<sup>8</sup> Bigler v. Flichinger, 55 Pa. St., 279; Turner v. Huggins, 14 Ark., 21; Hanks v. McKee, 2 Litt., 227; s. c., 13 Am. Dec., 265; Patterson v. Kirkland, 34 Miss., 423; Gregory v. Schoenell, 55 Ind., 101.

<sup>9</sup> See Maynard v. Maynard, 49 Vt., 297; Jones v. Edwards, 1 Neb., 170.

with torts.<sup>1</sup> Where the vendor believed the representation to be true, although it afterward turns out to be false, it fails to constitute a case of fraud,<sup>2</sup> and is no ground for avoiding the sale, whatever may be its effect as a warranty.<sup>3</sup> Statements of a third person, to whom the vendee has been referred by the vendor, made subsequently to such reference, have the same effect as if made by the vendor; but the vendor is not responsible for information which the vendee may have received from such third person prior to the reference.<sup>4</sup> And the mere fact of their common interest in the sale, will not render one joint or common owner liable for, or affected by, misrepresentations made by his co-tenant.<sup>5</sup>

The purchaser is not bound to disclose facts known to him affecting the value of the thing sold;<sup>6</sup> nor will his representation of its value as being less than it really is, be a sufficient ground for avoiding the sale,<sup>7</sup> for this is matter of opinion and judgment, and in these particulars all persons, provided they are *sui juris* and unembarrassed by the existence of relations of trust or confidence among themselves, are required to act upon their own. But if the purchaser is interrogated upon any questions of fact, and he answers at all, he must do so truly and fully.<sup>8</sup> And neither party must say or do anything tending to mislead or impose upon the other.<sup>9</sup>

Where, after the contract of sale has been effected, the vendee fails to comply with its terms, the vendor may elect any one of three remedies, namely; he may hold the property for the purchaser, making tender, of course, where performance is legally concurrent, and sue for the entire price; or he may sell at the purchaser's risk, after due notice to him, and recover any difference between the contract price and the price realized; or he may retain the property as his own, and recover the difference between

<sup>1</sup> *Rose v. Hailey*, 39 Ind., 77; but see *Carter v. Abbott*, 33 Iowa, 180.

<sup>2</sup> *Homer v. Fellows*, 1 Dougl., 51.

<sup>3</sup> *Mason v. Chappell*, 15 Gratt., 572.

<sup>4</sup> *Linton v. Houck*, 4 Kan., 463; *Maynard v. Maynard*, 49 Vt., 297.

<sup>5</sup> *Holmes v. Wood*, 32 Ind., 201.

<sup>6</sup> *Laidlaw v. Organ*, 2 Wheat., 178; *contra*, *Frazier v. Gervais*, 1 Miss., 72.

<sup>7</sup> *Barlow v. Wiley*, 3 A. K. Marsh., 457.

<sup>8</sup> *Bench v. Sheldon*, 14 Barb., 66; *Blydenburgh v. Welsh*, 1 Baldw., 331; *Gartner v. Barnets*, 1 Yeates, 307; *Butler's Appeal*, 26 Pa. St., 63.

<sup>9</sup> *Laidlaw v. Organ*, *supra*; *Bench v. Sheldon*, *supra*.

the contract price and the market value at the time and place of delivery.<sup>1</sup> If the purchaser has procured the sale by falsely representing his ability to pay, the vendor may, on discovering the fraud, avoid the sale, and, if the goods have been delivered, he may retake them; but the mere fact of insolvency, though known to the vendee at the time of the purchase, will not invalidate the sale if unaccompanied by misrepresentation.<sup>2</sup> Even after an attachment by creditors, or an assignment for the benefit of creditors, the vendor may replevy the goods, if there were false representations as to the ability to pay, or a fraudulent concealment of insolvency;<sup>3</sup> and although an innocent third person purchasing in good faith from the fraudulent vendee will be protected,<sup>4</sup> a purchase in payment of an antecedent debt has been held insufficient to entitle to such protection.<sup>5</sup>

What are known as *conditional sales*, that is, the delivery of goods or chattels by a proposed vendor to the proposed vendee, under agreement that the title shall remain in the former until some condition, usually the payment of the price, has been performed, has been the subject of considerable discussion and diversity of opinion. Where, as is usually the case, the agreement is not made a matter of record, but rests merely within the knowledge of the parties, such transactions would seem to be clearly within the reason of the rule which invalidates sales unaccompanied by delivery and continued change of possession, namely, the frauds upon creditors and others likely to result from ostensible, but unreal, ownership; and they have accordingly been held by some courts to vest an absolute title in the proposed vendee,

<sup>1</sup> *Dustan v. McAndrew*, 44 N. Y., 72; *Merriman v. Kellogg*, 58 Barb., 445; *Westfull v. Peacock*, 63 Barb., 209.

<sup>2</sup> *Bell v. Ellis*, 33 Cal., 620; *Hennequin v. Naylor*, 24 N. Y., 139; *Buffington v. Gerrish*, 15 Mass., 156; *Backentoss v. Speicher*, 31 Pa. St., 324; *Griffin v. Chubb*, 7 Tex., 603.

<sup>3</sup> *Jordan v. Parker*, 56 Me., 557; *Donaldson v. Farwell*, 93 U. S., 631; *Patton v. Campbell*, 70 Ill., 72; and see *Landaner v. Cochran*, 54 Ga., 533.

<sup>4</sup> *Williamson v. Russell*, 39 Conn., 406; *Mears v. Waples*, 3 Houst., 581; *Barnard v. Campbell*, 58 N. Y., 73; s. c., 17 Am. Rep., 208; *Wilson v. Fuller*, 9 Kans., 176; *Cochran v. Stewart*, 21 Minn., 435; *Kern v. Thurber*, 57 Ga., 172.

<sup>5</sup> *Barnard v. Campbell*, 58 N. Y., 73; s. c., 17 Am. Rep., 208; *Ratcliffe v. Sangston*, 18 Md., 383.

except as between the parties.<sup>1</sup> The danger, however, is no greater than in the case of hiring, loaning, or other forms of bailment, under which chattels come into and remain in the possession of one man while the title is in another, so that the former can neither subject them to liability for the payment of his debts, nor pass a valid title to an innocent purchaser; and as the contracts in question may not only be entered into in perfect good faith, but are capable of answering useful purposes in commercial transactions, their validity is now well established by the decided weight of authority.<sup>2</sup> And conditional sales have been held valid, although unaccompanied by delivery.<sup>3</sup> In some of the cases, it is held that an innocent purchaser from the vendee will be protected;<sup>4</sup> but the current of authority is the other way.<sup>5</sup> Where the condition is the payment of the purchase money, its payment by the vendee will vest title in one who has purchased the property from him;<sup>6</sup> and tender of the amount due, although refused by the vendor, will have the same effect.<sup>7</sup> Where the parties have sought to disguise the true character of the transaction by calling it a lease, treating the partial payments as rent, but stipulating in effect that when they shall have aggregated a given sum the title shall vest in the

<sup>1</sup> *Martin v. Mathiot*, 14 Serg. & R., 214; s. c., 16 Am. Dec., 491; *Haak v. Linderman*, 64 Pa. St., 499.

<sup>2</sup> *Conway's Ex'r. v. Alexander*, 7 Cr., 219, 237; *Harkmen v. Russell*, 118 U. S., 663; *Crocker v. Gullifer*, 44 Me., 491; s. c., 69 Am. Dec., 118; *Cone v. Patterson*, 6 H. & J., 153; *Sawyer v. Shaw*, 9 Me., 47; *Couse v. Tregent*, 11 Mich., 65; *Deshon v. Bigelow*, 8 Gray, 159; *Armington v. Houston*, 38 Vt., 448; *McFarland v. Farmer*, 42 N. H., 386; *Price v. Jones*, 3 Head., 84; *Plummer v. Shirley*, 16 Ind., 380; *Hughes v. Sheaff*, 19 Iowa, 335; *Comstock v. Smith*, 23 Me., 202; *McBride v. Whitehead*, Ga. Dec., Part 1, 165; *Mount v. Harris*, 9 Miss., 185; *Little v. Page*, 44 Mo., 412; *Sage v. Slentz*, 23 Ohio St., 1; *Kenney v. Planey*, 3 Daly, 131. Held innocent third party protected: *Vaughn v. Hopson*, 10 Bush., 337.

<sup>3</sup> *Conard v. Atlantic Ins. Co.*, 1 Pet., 449; *Wood M. & R. Co. v. Brooke*, 2 Saw., 576.

<sup>4</sup> *Vaughn v. Hopson*, *supra*; *Dudley v. Abner*, 52 Ala., 572; and see *Young v. Bradley*, 68 Ill., 553.

<sup>5</sup> *Couse v. Tregent*, *supra*; *Little v. Page*, *supra*; *Kenney v. Planer*, *supra*; *Sage v. Slentz*, *supra*; *Ridgeway v. Kennedy*, 52 Mo., 24; *Sumner v. McFarlan*, 15 Kans., 600; *Hallowell v. Milne*, 16 Kans., 65; *Enlow v. Klein*, 79 Pa. St., 488; *Ketcham v. Brennan*, 53 Miss., 596.

<sup>6</sup> *Currier v. Knapp*, 117 Mass., 324.

<sup>7</sup> *Day v. Bassett*, 102 Mass., 445.

alleged lessee, it is generally treated by the courts as a sale, and the claims of the vendor for the unpaid instalments of purchase money subordinated to those of creditors and subsequent purchasers from the vendee, unless the agreement was duly recorded.<sup>1</sup> And in doubtful cases the law will construe the transaction to be a sale and mortgage, and not a conditionnal sale.<sup>2</sup>

In conditional sales, the vendee's rights are not necessarily lost by mere failure to pay at the times stipulated, and each subsequent effort of the vendor to collect is a waiver of prior forfeitures.<sup>3</sup> A vendor desiring to claim forfeiture and resume possession, must first notify the vendee, in order that the latter may have an opportunity to tender payment;<sup>4</sup> and it has been held that he must, in addition, return or tender what has been paid under the contract.<sup>5</sup> Such contracts, however, usually provide in terms as to the disposition to be made of the payments actually made, in case of forfeiture.<sup>6</sup> If the vendee dies before performance of the condition, the transaction is treated as a bailment coupled with an interest, which passes to the personal representatives and entitles them to the property upon performance.<sup>7</sup>

Where personal property is delivered to one upon a contract which requires return of the identical property, though in a greatly altered form, as where A. allowed B. to use hay, the manure therefrom to belong to A., there is no sale or transfer of property; and, in the case supposed, it was held that a sale of the manure by B. was invalid.<sup>8</sup> Delivery of raw material to a manufacturer upon the latter's contract to return manufactured articles of equal value, however, is a sale,<sup>9</sup> or rather an agreement for an exchange, which transfers the property in the material so delivered.<sup>10</sup> Where the contract is for the purchase of an entire chattel, as an engine, delivery of the several parts as they are

<sup>1</sup> *Price v. McCallister*, 3 Grant Cas., 248; *Bridget v. Cornish*, 1 Mackey, 29.

<sup>2</sup> *Hughes v. Sheaff*, 19 Iowa, 335.

<sup>3</sup> *Deroe v. Jamison*, 33 Mich., 94.

<sup>4</sup> *Cushman v. Jewell*, 14 N. Y. Sup. Ct., 525.

<sup>5</sup> *Ketchum v. Brennan*, 53 Miss., 596.

<sup>6</sup> See *Harkness v. Russell*, 118 U. S., 663, and citations.

<sup>7</sup> *Grant v. Williams*, 6 Ired., L., 341.

<sup>8</sup> *Moore v. Holland*, 39 Me., 307.

<sup>9</sup> *Foster v. Pettibone*, 7 N. Y., 433; s. c., 57 Am. Dec., 530.

<sup>10</sup> See *Mitchell v. Gile*, 12 N. H., 390; *Carlisle v. Wallace*, 12 Ind., 252; *Buffum v. Merry*, 3 Mason, 478.

made, vests no title until the whole is complete.<sup>1</sup> Delivery of a chattel, with the privilege of retaining it at a stated price, is a bailment and not a sale;<sup>2</sup> and in sales by sample the goods remain the vendor's, and at his risk in case of loss, until delivery.<sup>3</sup>

But with regard to goods of the value of 10*l.* or upwards, additional requisites have been enacted by the seventeenth section of the Statute of Frauds,<sup>4</sup> which provides, "that no contract for the sale of any goods, wares and merchandises for the price of 10*l.* sterling or upwards shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

This section of the statute is in force by adoption in some of our American States, and has been substantially re-enacted in others, the limitation of value varying from \$30 in Arkansas, Maine, Missouri and New Jersey to \$200 in California. In other States, as Alabama, Delaware, Illinois, Kansas, Kentucky, North Carolina, Pennsylvania, Rhode Island, Tennessee, Texas, Virginia and West Virginia, neither the seventeenth section of the English statute, nor any substitute for it, appears to be in force, while, in Florida, all contracts for the sale of personal property, irrespective of value, are within the provisions of that section.

The above section of the Statute of Frauds has been interpreted by a vast number of cases, decided on almost every one of the phrases it contains.<sup>5</sup> The chief difficulty has been to determine the exact meaning of the acceptance of part of the goods and actual receipt of the same, required on the part of the buyer, and to ascertain in each particular case whether such acceptance and actual receipt have taken place or not. The acceptance required appears not to be necessarily such as shall preclude the purchaser from afterwards objecting to the quality of the goods,<sup>6</sup> and it may be

<sup>1</sup> *Shell v. Heywood*, 16 Pa. St., 523.

<sup>2</sup> *Rowe v. Sharp*, 51 Pa. St., 26.

<sup>3</sup> *Maillard v. Nihoul*, 21 La. Ann., 412; and see *Kern v. Tupper*, 52 N. Y., 550.

<sup>4</sup> 29 Car. II., c. 3.

<sup>5</sup> See *Smith's Mercantile Law*, 468 *et seq.*, 5th ed.; 495 *et seq.*, 6th ed.

<sup>6</sup> *Morton v. Tibbett*, 15 Q. B., 423 (69 E. C. L.); *Bushell v. Wheeler*, 15 Q. B., 442 (69 E. C. L.); *Currie v. Anderson*, 2 E. & E., 592, 600 (105 E. C. L.). See,

prior to the receipt.<sup>1</sup> Actual receipt seems, according to the great preponderance of authority, to mean receipt of the *possession* of the goods, and to be merely correlative to delivery of possession on the part of the vendor.<sup>2</sup> There must, therefore, be an actual transfer of the article sold, or some part thereof, by the seller, and an actual taking of possession of it by the buyer.<sup>3</sup> The possession of a simple bailee is, however, as we have seen,<sup>4</sup> constructively the possession of the bailor. If, therefore, the vendor should change his character and become the bailee of the purchaser, there may be a sufficient actual receipt in law on the part of the purchaser, although the goods still remain in the possession of the vendor.<sup>5</sup> So if any part of the goods be delivered to an agent of the vendee, or to a carrier named by him, this is a sufficient receipt by the vendee himself;<sup>7</sup> and if the goods should be in the possession of a warehouseman or wharfinger at the time of sale, the receipt by the purchaser of a delivery order, provided it were coupled with the assent of the bailee, would be a sufficient receipt of the goods within the statute.<sup>6</sup> The wharfinger holds the goods as the agent of the vendor, until he has agreed with the purchaser to hold for him. Then, and not till then, the wharfinger is the agent or bailee of the purchaser, and the possession of such wharfinger is that of the purchaser; and then only is there a constructive delivery to him.<sup>8</sup>

The requisitions of the statute, it will be observed, are in the alternative. Either the buyer must accept part of the goods sold, and actually receive the same; or he must give something in earnest or in part of payment; or some note or memorandum in writing

however, *Hunt v. Hecht*, 8 Exch., 814; *Nicholson v. Bower*, 1 E. & E. 72 (102 E. C. L.); *Smith v. Hudson*, Q. B., 11 Jur., N. S., 622; a. c., 6 B. & S., 431 (118 E. C. L.).

<sup>1</sup> *Cusack v. Robinson*, 1 B. & S., 299 (101 E. C. L.).

<sup>2</sup> *Smith's Mercantile Law*, 472, n. (g), 5th ed.; 499, n. (m), 6th ed.; *Saunders v. Topp*, 4 Ex. Rep., 390.

<sup>3</sup> *Baldy v. Parker*, 2 B. & C., 37, 41 (9 E. C. L.).

<sup>4</sup> *Ante*, p. 39.

<sup>5</sup> *Castle v. Swarder*, Exch. Chamb., 6 H. & N., 828, reversing the judgment of the Court of Exchequer, 5 H. & N., 281.

<sup>6</sup> *Dawes v. Peck*, 8 T. Rep., 330; *Hart v. Bush*, 1 E. B. & E., 494, 498 (96 E. C. L.) See, however, *Norman v. Phillips*, 14 M. & W., 277; *Coombs v. Bristol and Exeter Railway Company*, 3 H. & N., 510.

<sup>7</sup> *Bentall v. Burn*, 3 B. & C., 423 (10 E. C. L.); *Pearson v. Dawson*, 1 E. B. & E., 448 (96 E. C. L.). See *ante*, p. 48.

<sup>8</sup> *Farina v. Horne*, 16 M. & W., 119, 123.

must be signed. The two former alternatives are left as they were before the statute;<sup>1</sup> but the last is a new requisition which must be observed in the absence of either of the former.<sup>2</sup> The effect of the statute, therefore, is to abolish tender and mere words as sufficient for a sale, and to substitute for them the more exact evidence of a note or memorandum in writing. But as the memorandum may be signed by an agent lawfully authorized, the bought or sold notes given by a broker are a sufficient memorandum within the meaning of the statute.<sup>3</sup> And it is held that the entry of a purchaser's name by an auctioneer's clerk at an auction is also sufficient to satisfy the statute, as the clerk is, for that purpose; the authorized agent of the purchaser.<sup>4</sup> But one of the contracting parties to a sale cannot be the agent for the other for the purpose of signing a memorandum of the bargain.<sup>5</sup>

If the agreement is not to be performed within the space of one year from the making thereof, then, however small be the value of the goods, no action can be brought upon it, unless the agreement, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. This is another provision of the Statute of Frauds,<sup>6</sup> and will be hereafter noticed more particularly.

Although the property in goods sold passes, as we have seen,<sup>7</sup> from the vendor to the vendee immediately upon the execution of a valid contract for sale, yet the possession of the goods, of course, remains with the vendor until he delivers them, which he is bound to do when the purchaser is ready to pay the price,<sup>8</sup> but not before.<sup>9</sup> And so long as the vendor retains actual or constructive possession of the goods, he has a lien upon them for so much of the purchase-money as may remain unpaid.<sup>10</sup> But when the goods are once de-

<sup>1</sup> But see *supra*, p. 79.

<sup>2</sup> *Lee v. Griffith*, 1 B. & S., 272 (101 E. C. L.); *Wilkinson v. Evans*, Law Rep., 1 C. P., 407. See *Vanderbergh v. Spooner*, Law Rep., 1 Ex., 316.

<sup>3</sup> *Grove v. Alfalo*, 6 B. & C., 117 (13 E. C. L.); *Barton v. Crofts*, 16 C. B. N. S., 11 (111 E. C. L.).

<sup>4</sup> *Bird v. Boulter*, 4 B. & Ad., 443 (24 E. C. L.).

<sup>5</sup> *Farebrother v. Simmons*, 5 B. & Ald., 333 (7 E. C. L.).

<sup>6</sup> 29 Car. II., c. 3, s. 4.

<sup>7</sup> *Ante*, p. 76.

<sup>8</sup> *Rawson v. Johnson*, 1 East, 203.

<sup>9</sup> *Bloxam v. Sanders*, 4 B. & C., 941 (10 E. C. L.).

<sup>10</sup> *Dixon v. Yates*, 5 B. & Ad., 313 (27 E. C. L.); *Lackington v. Atherton*, 7 M. & G., 360 (49 E. C. L.).



livered by the vendor out of his own actual or constructive possession, his lien is gone; for lien in law is, as we have seen,<sup>1</sup> merely a right to retain possession, and not to recover it when given up.

Under certain circumstances, however, the vendor of goods has a right to resume their possession, with which he had previously parted under a contract for sale. This right is called the right of *stoppage in transitu*; and it occurs when goods are consigned entirely or partly<sup>2</sup> on credit from one person to another, and the consignee becomes bankrupt or insolvent before the goods arrive. In this event the consignor<sup>3</sup> has a right to direct the captain of the ship, or other carrier, to deliver the goods to himself or his agent instead of to the consignee, who has thus become unable to pay for them. The right of stoppage in transitu was first allowed and enforced only by the Court of Chancery, which, in the exercise of its equitable jurisdiction, considered that, under the circumstances above mentioned, it was very allowable in equity for the consignor to get his goods again into his own hands.<sup>4</sup> But the right was subsequently acknowledged by the courts of law; and it is now constantly enforced by them. As this right was originally of equitable origin, it cannot be expected to depend on strictly legal principles; and the doctrines of law on this particular subject are in fact unlike its usual doctrines on other matters. Thus, it is at variance with the general principles of law that a man should be allowed to transfer to another a right which he has not, or that a second purchaser should stand in a better position than his vendor;<sup>5</sup> but the consignee of goods may, by indorsing the bill of lading to a *bona fide* indorsee, defeat the consignor's right to stop in transitu.<sup>6</sup> So a delivery of goods into the possession of a carrier appointed by the vendee is, in construction of law, a delivery to the vendee himself, and divests the vendor of his lien for the unpaid purchase-money;<sup>7</sup> but until the *transitus* is completely ended, or the goods come to the

<sup>1</sup> *Ante*, pp. 40, 44.

<sup>2</sup> *Hodgson v. Loy*, 7 T. R., 440.

<sup>3</sup> *Bird v. Brown*, 4 Ex. Rep., 786.

<sup>4</sup> *Wiseman v. Vandeputt*, 2 Vern., 208; *Snee v. Prescott*, 1 Atk., 245.

<sup>5</sup> *Dixon v. Yates*, 5 B. & Ad., 339 (27 E. C. L.).

<sup>6</sup> *Lickbarrow v. Mason*, 2 T. R., 63; s. c., 1 H. Bl., 357; s. c., 6 East, 21; s. c., *Smith's Leading Cases*, 9th Amer. ed., 1045; *Jenkins v. Usborne*, 7 M. & G., 678, 699 (49 E. C. L.).

<sup>7</sup> *Dawes v. Peck*, 8 T. R., 390; *ante* p. 48; *Wilmshurst v. Bowker*, in error, 7 M. & G., 882 (49 E. C. L.).

actual possession of the vendee, the vendor's right to stop them in transitu may still be exercised in the event of the bankruptcy or insolvency of the vendee,<sup>1</sup> unless indeed such right be defeated, as we have said, by a *bona fide* indorsement of the bill of lading. Thus, although by the sale of the goods the property in them, involving the risk of their loss, passes to the purchaser, and although the possession of them be delivered to a carrier named by him, still such possession may be resumed by the vendor during the journey, in the event of the bankruptcy or insolvency of the vendee.<sup>2</sup> As this right is a departure from legal principles on behalf of the vendor, it is allowed in only two cases, namely, bankruptcy or insolvency, by which latter term appears to be here meant a general inability to pay, evidenced by stopping of payment.<sup>3</sup> When possession of goods has been resumed by the vendor under his right of stoppage in transitu, he is restored to the lien for the unpaid purchase-money which he had before he parted with such possession; but, according to the better opinion, the contract for sale is not thereby rescinded.<sup>4</sup>

There is one case in which the property in goods passes from one person to another by payment of their value without any actual sale. In an action of trover,<sup>5</sup> the plaintiff is entitled to damages equal to the value of the property he has lost, but not further, unless he has sustained some special damage.<sup>6</sup> The defendant, therefore, having paid the amount of the damages, is entitled to retain the goods in respect of which the action is brought; and the property in them vests in him accordingly.<sup>7</sup>

<sup>1</sup> *Holst v. Pownal*, 1 Esp., 240; *Northey v. Field*, 2 Esp., 613; *Jackson v. Nichol*, 5 New Cas., 508, 519. See *Van Casteel v. Booker*, 2 Ex. Rep., 691; *Heinekey v. Earle*, 8 E. & B., 410 (92 E. C. L.); *Smith v. Hudson*, Q. B., 11 Jr., N. S., 622; s. c., 6 B. & S., 431 (118 E. C. L.); *Berndtson v. Strang*, L. C., 16 W. R., 1025; s. c., L. Rep., 4 Eq., 481; s. c., Law Rep., 3 Ch., 588.

<sup>2</sup> But see *Bolin v. Huffnagle*, 1 Rawle, 9.

<sup>3</sup> See *Smith's Merc. Law.*, 525, n. (b), 5th ed.; 554, n. 6th ed.. The case of *Wilmschurst v. Bowker*, 5 New Cas., 541; s. c., 7 Scott, 56; s. c., 2 M. & G., 792 (49 E. C. L.) was reversed in error, 7 M. & G., 882 (49 E. C. L.)

<sup>4</sup> *Bloxam v. Sanders*, 4 B. & C., 949 (10 E. C. L.); *Lickbarrow v. Mason*, *Smith's Leading Cases*, 9th Am. ed., 1090; *Schotsmans v. Lancashire and Yorkshire, Railway Company*, Law Rep., 2 Ch., 332, 340; 36 L. J., N. S., 361, 366.

<sup>5</sup> See *ante*, p. 36.

<sup>6</sup> *Bodley v. Reynolds*, 8 Q. B., 779 (55 E. C. L.).

<sup>7</sup> *Cooper v. Shepard*, 3 C. B., 266, 272 (54 E. C. L.). See *Buckland v. Johnson*, C. P., 18 Jur., 775; s. c., 15 C. B., 145 (80 E. C. L.).

The alienation of personal chattels is prohibited to be made by certain persons and for certain objects. And first with respect to persons. An *alien* or foreigner is under great restrictions as to the acquirement of real estate;<sup>1</sup> but, with respect to personal chattels, he stands on the same footing as a natural-born subject. The gift of an *infant* or person under the age of twenty-one years is voidable,<sup>2</sup> and that of an *idiot* or *lunatic* appears to be absolutely void:<sup>3</sup> in this respect the law of personal chattels is now the same as that of real estate.<sup>4</sup> Married women also are incapable of making any disposition of personal chattels, except such as may be settled in trust for their own *separate use*; for marriage is an absolute gift in law to her husband of all the wife's choses in possession, as well those she is possessed of at the time of the marriage as those which come to her during her coverture.<sup>5</sup> Very generally throughout our American States statutes, known as the "Married Women's Acts," exist which vest in married women a legal separate estate in property, both real and personal, belonging to them at the time of marriage, or acquired during marriage otherwise than by gift or conveyance from the husband. These statutes vary too greatly in the several States, both in phraseology and judicial construction, to admit of anything like a thorough consideration in works like the present.<sup>6</sup> Persons convicted of treason or felony forfeit on such conviction the whole of their goods and chattels to the crown: and nothing but a *bona fide* alienation for a valuable consideration, made previously to conviction, can avert such forfeiture.<sup>7</sup>

With regard to the objects for which the alienation of chattels personal is prohibited, gifts to charitable purposes are not restricted, neither are corporations excepted objects, as in the case of landed property;<sup>8</sup> but throughout the United States statutes

<sup>1</sup> See Williams' Real Property, 56, 2d ed.; 58, 3d & 4th eds.; 61, 5th & 6th eds.; 62, 7th & 8th eds.; 6th Am. ed., 57.

<sup>2</sup> Bac. Abr. tit. Infancy and Age (I), 3.      <sup>3</sup> *Ibid.*, tit. Idiots and Lunatics (F).

<sup>4</sup> See Williams' Real Property, 57, 2d ed.; 59, 3d & 4th eds.; 62, 5th ed.; 63, 6th ed.; 64, 7th & 8th eds.; 6th Am. ed., 58, 59.

<sup>5</sup> Co. Litt., 300 a; 1 Rep. Husb. and Wife, 169. See, *post*, the chapter on Husband and Wife.

<sup>6</sup> But see *post*, p. 351.

<sup>7</sup> Twyne's Case, 3 Rep., 82 b; s. c., Sm. L. C., 9th Am. ed., 6, 18; 4 Bla. Com., 387, 388; Perkins v. Bradley, 1 Hare, 219; Chowne v. Baylis, 31 Beav., 351.

<sup>8</sup> See Williams' Real Property, 58, 2d ed.; 60, 61, 3d & 4th eds.; 64, 65, 5th ed.; 69, 6th ed.; 72, 7th & 8th eds.; 6th Am. ed., 59, 60.

generally exist rendering invalid gifts by deed or will to religious uses, unless made a prescribed period of time prior to the death of the grantor or testator. By a statute of the reign of Elizabeth,<sup>1</sup> the gift or alienation of any lands, tenements, hereditament, *goods and chattels*, made for the purpose of delaying, hindering or defrauding creditors, is rendered void as against them, unless made upon *good*, which here means *valuable*, consideration, and *bona fide*, to a person not having at the time of such gift any notice of such fraud. The fraudulent purpose intended by the statute of Elizabeth can of course only be judged of by circumstances. Thus it has been held that, if the owner of goods make an absolute assignment of them by deed to one of his creditors and yet remain in the possession of the goods, such remaining in possession is a badge of fraud, which renders the assignment void, by virtue of the statute, as against the other creditors.<sup>2</sup> But if the assignment be made to secure the payment of money at a future day, with a proviso that the debtor shall remain in possession of the goods until he shall make default in payment, the possession of the debtor, being then consistent with the terms of the deed, is not regarded in modern times as rendering the transaction fraudulent within the meaning of the statute.<sup>3</sup> Such a transaction is in fact a *mortgage* of the goods, analogous to a mortgage of lands.<sup>4</sup> The property in the goods passes at law by deed to the mortgagee,<sup>5</sup> whilst the possession of them rightly remains with the mortgagor. The mortgagee therefore cannot maintain an action of trover for the goods against a stranger, until default has been made by the mortgagor in payment of the money secured.<sup>6</sup> In this respect a mortgage of goods

<sup>1</sup> Stat. 13 Eliz., c. 5.

<sup>2</sup> *Twyne's Case*, 3 Rep., 80 b ; s. c., *Smith's Leading Cases*, 9th Am. ed., 1 ; *Edwards v. Harben*, 2 T. Rep., 587.

<sup>3</sup> *Edwards v. Harben*, 2 T. Rep., 587 ; *Martindale v. Booth*, 3 B. & Ad., 498 (23 E. C. L.) ; *Reed v. Wilmot*, 7 Bing., 577 (20 E. C. L.).

<sup>4</sup> See *Williams' Real Property*, 332, 2d ed. ; 349, 4th ed. ; 360, 5th ed. ; 382, 6th ed. ; 389, 7th ed. ; 407, 8th ed. ; 6th Am. ed., 328, 329.

<sup>5</sup> *Gale v. Burnell*, 7 Q. B., 850 (53 E. C. L.).

<sup>6</sup> *Bradley v. Copley*, 1 C. B., 685 (50 E. C. L.) ; *Brierley v. Kendall*, 17 Q. B., 937 (79 E. C. L.). If the mortgagor should retain possession *after* default in payment at the time specified, it may possibly be doubted whether the security would not then be void as against creditors under the statute of Elizabeth, for, by the terms of the deed, the mortgagor is only to enjoy possession *until* default.

differs from a mere pledge, in which the property in the goods remains with the pledgor, and the pledgee, although he may have power to sell them, obtains possession only,<sup>1</sup> the right to retain which enables him to maintain an action of trover.<sup>2</sup>

Choses in possession have long been liable to involuntary alienation for the payment of the debts of their owner. On the decease of any person, his personal property generally has always been liable, in the first place, to the payment of his debts of every kind. And if a creditor take proceedings against his debtor in the debtor's lifetime, a sale of his goods and chattels may be procured by means of a writ of *feri facias* (*fi. fa.*) issued in execution of the judgment of the court. This writ is of very ancient date, and is usually said to be given by the common law; though some suppose that its name arose from the wording of the statute of Edward I.,<sup>3</sup> by which the writ of *elegit* was provided.<sup>4</sup> The writ directs the sheriff to cause the debt to be realized out of the goods and chattels of the debtor, *quod fieri facias de bonis et catallis*, etc.; and a sale of the goods is made by the sheriff accordingly. Goods, however, are not, as lands formerly were, affected by the mere entry of a judgment of a court of law against the owner. The debtor was always allowed to alienate his goods until the writ of execution was issued; although, by a fiction of law, all judicial proceedings, writs of execution included, formerly related back to the first day of the term to which they belonged.<sup>5</sup> Goods, therefore, which had been sold after the first day of a term, might yet practically have been seized under a writ of *fi. fa.* relating back to that day, but subsequently issued. To remedy this evil, it was enacted by one of the sections of the Statute of Frauds,<sup>6</sup> that no writ of *feri facias* or other writ of execution shall bind the property of the goods against which it is sued, but from the time that such writ shall be delivered to the sheriff, under-sheriff, or coroner, to be executed; and

But the better opinion is that the deed will still be good. See 2 Davidson's Precedents, 609, 2d ed.; *Ex parte* Sparrow, 2 De G., M. & G., 907.

<sup>1</sup> *Ante*, pp. 39-40, 51.

<sup>2</sup> *Legg v. Evans*, 6 M. & W., 36.

<sup>3</sup> Stat. 13 Edw. I., c. 18, called the Statute of Westminster the Second. See Williams' Real Property, 63, 2d ed.; 66, 3d and 4th eds.; 71, 5th ed.; 75, 6th ed.; 78, 7th and 8th eds.; 6th Am. ed., 66.

<sup>4</sup> Bac. Abr. tit., Execution (C).

<sup>5</sup> Com. Dig. tit., Execution (D. 2); Anon., 2 Vent., 218. See 2 Sugd. Vend. & Pur., 9th ed., 198.

<sup>6</sup> Stat. 29 Car. II., c. 3, s. 16.

the officer is required, upon receipt of the writ, to indorse on it (without fee) the day of the month and year on which he received it. Goods and chattels might therefore be safely alienated, although judgment might exist against the owner, provided a writ of execution were not actually in the hands of the sheriff.

In many, but not all, of the United States, statutes now provide that, as against third persons, without notice, the writ shall bind the goods only from the time of actual levy. And in all the States, exemption laws exist, which relieve from execution certain designated personal property of the judgment debtor, being the head of a family or householder. Such exemptions are made for the benefit, not of the debtor, but of his family; and, therefore, contracts or engagements entered into by the former, undertaking, *in futuro*, to waive the benefit of exemptions, have repeatedly been adjudged invalid.<sup>1</sup> As partners are entitled only to what may be left of the partnership assets after payment of the partnership debts, the better opinion seems to be that, neither in an execution against the partners, nor in a voluntary assignment by them for the benefit of creditors, can the benefit of the exemption laws be claimed.<sup>2</sup> When the family is broken up, as by death, majority or marriage of the children, etc., the property becomes disencumbered and liable to execution.<sup>3</sup>

In estimating the exempted property to which the debtor is entitled, mortgaged chattels are to be excluded.<sup>4</sup> But, it seems,

<sup>1</sup> *Kneettle v. Newcomb*, 22 N. Y., 249; s. c., 78 Am. Dec., 186; *Denny v. White*, 2 Cald., 283; *Maxwell v. Reed*, 7 Wis., 583; *Curtis v. O'Brien*, 20 Iowa, 376; *Recht v. Kelly*, 82 Ill., 147; s. c., 25 Am. Rep., 301; *Carter's Admrs. v. Carter*, 20 Fla. 558; s. c., 51 Am. Rep., 618; *Moxley v. Regan*, 10 Bush., 156; *Green v. Watson*, 75 Ga., 471; s. c., 58 Am. Dec., 479; *Ross v. Lister*, 14 Texas, 469; *Eltzroth v. Webster*, 15 Ind., 21; *Wallingford v. Bennett*, 1 Mackey, 303. But see *Neff v. Edwards*, 81 Ala., 246; *Case v. Dunmore*, 23 Pa. St., 93; *Lauck's Appeal*, 22 Pa. St., 426; *Johnson & Sutton's Appeal*, 1 Casey, 116; *Osborne v. Shutt*, 67 Mo., 712.

<sup>2</sup> *Prosser v. Hartley*, 35 Minn., 340; *Ex parte Hopkins*, 104 Ind., 157. *Spiro v. Paxton*, 3 Lea, 75; s. c., 31 Am. Rep., 630; *Wise v. Frey*, 7 Neb., 134; s. c., 29 Am. Rep., 380; *State ex rel. Billingsley v. Spencer*, 64 Mo., 355; s. c., and note, 27 Am. Rep., 244. But see, *contra*, *O'Gorman v. Fink*, 57 Wis., 649; s. c., 46 Am. Rep., 58; *Blanchard v. Paschal*, 68 Ga., 32; s. c., 45 Am. Rep., 474.

<sup>3</sup> *Rutledge v. McFarland*, 75 Ga., 774.

<sup>4</sup> *Greenleaf v. Sanborn*, 44 N. H., 16.

on foreclosure of a mortgage, the debtor may claim his exemptions out of the proceeds in excess of the mortgage debt.<sup>1</sup>

It has been decided that an alienation to secure or satisfy another creditor is not void within the above-mentioned statute of the 13 Elizabeth,<sup>2</sup> although made with the intention of defeating an expected execution of the judgment creditor.<sup>3</sup> Besides the sale of goods under the writ of *feri facias*, there might also be a writ of *levari facias*, now disused, by which the sheriff levied the corn and other present profit which grew on the lands, together with the rents then due, and the cattle thereon.<sup>4</sup> And, by the writ of *elegit*, the goods of the debtor are delivered to his creditor at an appraised value, together with possession of his lands.<sup>5</sup>

<sup>1</sup> State v. Mason, 88 Mo., 411.

<sup>2</sup> Stat. 13 Eliz., c. 5.

<sup>3</sup> Wood v. Dixie, 7 Q. B., 892 (53 E. C. L.); Hale v. Saloon Omnibus Company, 4 Drew., 492.

<sup>4</sup> 2 Wms. Saunders, 68 a. n. (1).

<sup>5</sup> Pullen v. Purbecke, 1 Ld. Raym., 346. See the present forms of this writ of *fi. fa.*, 9 A. & E., 986 (36 E. C. L.) *et seq.*, 5 New Cas., 366 *et seq.*

## CHAPTER IV.

### OF SHIPS.

By the common law, ships and vessels are personal property and are subject to the ordinary incidents of such property. Their peculiar character, however, has given rise to some distinctive and special rules; and statute law has in a measure assimilated them to real estate.

A distinction may be noted at the outset between vessels engaged in commerce upon the high seas and the great navigable waters of the world, and those used merely for local and limited purposes. Small craft, such as row boats, ferry boats, fishing boats, canal boats, pleasure yachts, and the like, are usually regarded as beyond the purview of maritime and commercial law; and their ownership and disposal are regulated by the same rules that govern the ownership and disposal of other personal property. But ships and vessels of larger size and such as are adapted to carry on the commerce of the world upon the seas, great lakes and large rivers of the earth, and which, by reason of their movability from state to state and from nation to nation, acquire to a certain extent a national character, are regarded as part of the country in which they are owned, and are protected and regulated by peculiar provisions of national and international law.

The Constitution of the United States, Art. I., Sec. 8, gives to the Congress of the Federal Union the exclusive right "to regulate commerce with foreign nations, and among the several States;" and by Art. III., Sec. 2, of the same instrument, the judicial power of the United States is extended "to all cases of admiralty and maritime jurisdiction." Under this grant of power to the Federal government, the ownership, management and control of ships and vessels, engaged in commerce upon navigable waters, have become the subject of Federal legislation; and controversies in regard to them are the subject of adjudication by the Federal tribunals.



The ownership of personal property does not usually require to be evidenced by any writing. Possession is *prima facie* evidence of such ownership; and the title passes by transfer or delivery of the thing itself. It is different with regard to ships and vessels. The Federal legislation, similar in this regard to the legislation of all the civilized nations of the world, requires that ownership should be evidenced by record or registration, as in the case of real estate; that is, by an instrument of writing executed with certain formalities, and registered or recorded in some public office. The record of deeds of real estate is usually in the office of the Clerk of the County Court, or of some specially constituted official at the county seat of the county in which the land lies. The registration of ships and vessels is in the custom house, or at the office of the collector of the customs of the port to which the vessel belongs or in which the owner resides.

The subject of the registration and recording of ships and vessels in the United States is now regulated by the Revised Statutes of the United States, Title XLVIII., Chapter I., Secs. 4131-4196, in which are incorporated the substantial provisions of all the statutes enacted by Congress since the Federal Constitution went into effect. These provide, in brief, that only vessels built within the United States, and wholly owned by citizens of the United States, are entitled to registration and the protection of the United States; that the registration must be in the office of the collector of customs of the district in which the vessel belongs, which is that nearest to which the owner resides; that there must be a preliminary measurement and classification of the vessel, and the oath of the owner as to the time and place of building and the ownership of the vessel; that the benefits of registration cease whenever the vessel is sold to a foreigner and cannot again be acquired for the vessel, even though it should be repurchased by a citizen; and that false or fraudulent registration works a forfeiture of the vessel. Vessels captured in war and which have become lawful prize are placed upon the same footing as vessels built within the United States; and vessels built within the United States and owned in whole or in part by foreigners are entitled to registration with limited privileges. No bill of sale, conveyance, mortgage or hypothecation of any vessel is valid, unless recorded in the collector's office, except as between the immediate parties to

the transaction, their heirs and devisees, and those having actual notice of such transfer ; and all such transfers are required to be acknowledged before a notary public or some other officer authorized by law to take acknowledgments. These provisions, however, do not affect the lien or hypothecation of vessels during a voyage by what are known as bottomry bonds, given to procure necessary material, provisions, or repairs for a vessel, of which more special mention will be made hereafter.

Special regulations are made for the management of vessels, for their clearance or departure from port, for their entry thereto, for their conduct and navigation so as to avoid collision and insure the public safety, for the transportation of persons and merchandise in them, and for the summary punishment of offenses against the statutory requirements and the navigation laws. Vessels engaged in domestic commerce, that is, in commerce between the several States of the Union, are subjected to regulations similar to those which are provided for those engaged in foreign commerce. But vessels trading between different ports in the same State are not subject to Federal regulation ; because, by the express terms of the Federal Constitution, the power of Federal regulation is limited to foreign commerce and to commerce between the States, and it does not extend to the internal commerce of any State, either on land or water.

Whether "the admiralty and maritime jurisdiction," so called, of the Federal government extended to vessels engaged in commerce upon our great lakes and upon the great inland waters and navigable rivers of our country, was at one time a disputed question. In England, this jurisdiction was co-extensive with the ebb and flow of the tide ; and, as our admiralty and maritime jurisdiction was derived to us from England, it was thought that it could not extend to the great lakes and the navigable rivers in which the tide does not ebb and flow and to which it did not reach. By an act of February 26, 1845, Congress assumed to extend the admiralty and maritime jurisdiction of the United States to those waters ; and, after several antagonistic decisions in the lower tribunals, the Supreme Court of the United States, in the case of *The Genessee Chief*,<sup>1</sup> held the act to be a valid exercise of the Constitutional power reposed in the Federal legislature.

<sup>1</sup> 12 Howard, 443.

By virtue of the statute referred to, and of the decision thereon of the Supreme Court of the United States, ships and vessels on our navigable inland rivers and our great lakes are subject to the same regulations in substance as those that ply upon the high seas and tide waters.

The captain or master of a vessel has considerable control over it beyond that which appertains to the possession of other personal property by an ordinary agent. He can hypothecate or mortgage it in a foreign port, if need be, for the purpose of procuring necessary materials or provisions, or of making necessary repairs, to enable him to continue his voyage; and this he does by giving what is called a bottomry bond, by which he pledges the *bottom* or keel of the vessel, that is, in fact, the whole vessel, to secure the loan or advances made to him. These bottomry bonds have several peculiarities, principal among which are these three: 1. That there is no limitation in the rate of interest that may be required or agreed upon; 2. That the bonds or mortgages take priority of each other in the inverse order of their making—that is, the last becomes first, the next to the last becomes second, and so on—this rule being based upon the principle that it is the last mortgage which has enabled the ship to effect its purpose and given to the prior mortgagees the benefit of their several mortgages, which might have been lost without it; and 3. That, if the ship is lost during the voyage, the mortgage or bottomry bond perishes with it, and has no further binding force. The bond is in the nature of an insurance; and this is the reason for the absence of the ordinary limitation upon the rate of interest which the statute law applies to other contracts for the loan of money.

Another kind of maritime mortgage, not directly involving the vessel itself, is the *respondentia* bond, which is a hypothecation of the vessel's cargo by the master, and attended with the same peculiar features already mentioned as characterizing the bottomry bond, but which differs from the latter mainly in the fact that the respondentia bond is based upon the credit of the owners, rather than upon the property pledged or hypothecated.

The managing owner of a vessel, who is often so appointed when there are several owners in fact, or part-owners, as they are called, and who is known by the rather peculiar name of the *ship's husband*, has the same powers of hypothecation as the captain or

master. The *ship's husband* need not necessarily be a part-owner; any person may be constituted such by the owners.

When there several owners of a vessel, they are called *part-owners*. They are neither joint-tenants, because there is no right of survivorship among them; nor tenants in common, because there is no right of severance of their respective interests. A majority of the part-owners have the right to employ a vessel upon any special voyage or enterprise, even against the wishes of the minority, upon giving security in a court of admiralty to indemnify the minority against loss. When the majority do not choose to employ a ship, the minority have the right to do so upon giving similar indemnity; and, when part-owners happen to be equally divided, the disposition of courts of admiralty is to decree a sale of the vessel.<sup>1</sup>

When a vessel is hired, the contract of hiring is called a *charter-party*. With the exception that it is cognizable in a court of admiralty, and not in the ordinary common-law or equity courts, the construction of the provisions of a charter-party, and the relations between themselves of the parties thereto, are not different from other similar contracts.

When goods are shipped upon a vessel to be transported from one port to another, the captain or master gives to the shipper, or consignor, as he is called, a receipt, signed by him, and specifying the goods and the names of the consignor and consignee; and this receipt, which is called a *bill of lading*, becomes, to some extent, a negotiable instrument, having some of the features of bills of exchange and promissory notes. The indorsement and transfer of the bill of lading by the consignee, after its receipt by him, transfer the title to the property shipped; and it is now generally held that the right of suit thereon, and for the possession of the goods, if they should be detained from him, is vested in him.<sup>2</sup> Bills of lading, however, are not entitled to the same freedom of negotiability as bills of exchange and promissory notes, so as to cut out inquiry into the rights of previous holders.

Both matters of contract and matters of tort connected with the ownership, transfer, and employment of ships and vessels are, for

<sup>1</sup> Story on Partnership, sec. 439, where the authorities on this point are cited.

<sup>2</sup> See *Shaw v. Merchants' National Bank of St. Louis*, 111 U. S., 557.

the most part, cognizable in courts of admiralty, and not in the ordinary tribunals; and the course of procedure in regard to them is different from that in the ordinary common law courts. Where a contract, however, is unattended with any features of a maritime character, the mere fact that it relates to a vessel is not sufficient to render it a subject of admiralty cognizance; a suit to foreclose a mere mortgage of a ship, for example, or to determine the mortgagee's right to take possession under the mortgage, cannot be entertained in the admiralty courts, but must be brought in chancery.<sup>1</sup> The admiralty jurisdiction with us is vested in the District and Circuit Courts of the United States, subject to the right of appeal to the Supreme Court.

<sup>1</sup> *Bogart v. "The John Jay,"* 17 How., 399.

## PART II.

### OF CHOSSES IN ACTION.

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#### CHAPTER I.

##### OF ACTIONS EX DELICTO.

IN addition to movable goods, *choses in possession*, we have observed<sup>1</sup> that there existed also in ancient times *choses in action*, or the liberty of proceeding in the courts of law to recover pecuniary damages either for the infliction of a wrong or the non-performance of a contract, or else to procure the payment of money due. The actions to be thus brought were, of course, not real, but purely personal actions. Real actions were brought for the recovery of land or real property; but the above-mentioned actions were against persons only, and the object was merely to obtain from them money, being the only recompense generally available. And this right to bring an action at law, in other words a legal chose in action, constitutes a valuable kind of personal property.

The infliction of a wrong, and the non-performance of a contract, are evidently the two grand sources from which personal actions ought to proceed. If one man commits a wrong against another, justice evidently requires that he should give him satisfaction; and if one man enters into a contract with another, he certainly ought to keep it or make reparation for its breach; or if the contract be to pay a sum of money, the money ought to be duly paid. Personal actions are accordingly divided by the law of England into two great classes, actions *ex delicto*, and actions *ex contractu*.<sup>2</sup> The former arises in respect of a wrong committed, called in law French

<sup>1</sup> *Ante*, p. 7.

<sup>2</sup> 3 Black., Com., 117.

a *tort*; the latter in respect of a contract made for the performance of some action, which thus becomes a *duty*, or for the payment of some money, which thus becomes a *debt*. Let us consider, in the present chapter, the right of action which occurs *ex delicto*, or in respect of a *tort*.

The ancient law, in its dread of litigation, confined the remedy by action for a *tort*, or wrong committed, to the joint lives of the injurer and the injured. If either party died, the right of action was at an end, the maxim being *actio personalis moritur cum persona*.<sup>1</sup> In this rule, actions *ex delicto* only were included; of which, however, there seem to have been more than of any other in early times. But, by an early statute,<sup>2</sup> the same action was given to the executor, for any injury done to the personal estate of the deceased in his lifetime whereby it became less beneficial to the executor, as the deceased himself might have brought in his lifetime.

The actions used in suits arising from torts, known as actions *ex delicto*, were detinue, replevin, trespass and trespass on the case, the latter being the form of the remedy in all cases to which the other forms of action were not appropriate; and, as stated above, all suits founded upon such causes of action, as, for example, trespass for taking goods, trover, false imprisonment, assault and battery, slander, deceit, diverting a water-course, obstructing lights, or any other species of misfeasance or malfeasance where the declaration imputed a *tort* and the general issue was "not guilty," terminated with the death of either party.<sup>3</sup> The statute of 4th Edw., III., ch. 7, under a liberal construction of which it is now held that all actions for injury to personal property may be brought by the personal representatives of the party injured, did not provide for actions against the representatives of the wrong doer.<sup>4</sup> However, it was declared by Lord Mansfield<sup>5</sup> that if the *tort* was one through which the *tort-feasor* acquired property, or benefited his own estate, an action for the value of the property so acquired survives against his personal representative;<sup>6</sup> but, if the injury

<sup>1</sup> 1 Wms. Saund., 216 a, n., (1).

<sup>2</sup> Stat. 4 Edw. III., c. 7, *de bonis asportatis in vita testatoris*, extended by stat. 15 Edw. III., c. 5.

<sup>3</sup> Hegerich v. Keddie, 99 N. Y., 258; s. c., 52 Am. Rep., 25.

<sup>4</sup> Tyler's Stephen on Pleading, 30.

<sup>5</sup> In Hamblly v. Trott, Cowp., 371.

<sup>6</sup> See, also, Vittum v. Gilman, 48 N. H., 416; Chase v. Fitz, 132 Mass., 365.

was of a sort by which the offender acquired no gain to himself at the expense of the sufferer, as in the case of beating or imprisoning a man, and the like, the only remedy was by an assessment of damages in the lifetime of the parties. These rules, in the main, still determine the survivability of actions for torts, except in so far as the law has been specially modified or changed by statute in the several States.<sup>1</sup> Thus, an action under a statute enabling the personal representative to sue for death occasioned by the wrongful act, negligence or default of another is nevertheless abated by the death of the wrong doer;<sup>2</sup> an action against husband and wife for the tort of the latter, is abated by the wife's death;<sup>3</sup> actions for the malfeasance or misfeasance of a defendant still abate by his death, and cannot be revived against his representatives;<sup>4</sup> and the maxim, *actio personalis moritur cum persona*, still prevails as the general rule.<sup>5</sup>

The reason of this rule of the common law, according to Lord Ellenborough,<sup>6</sup> is because executors and administrators are the representatives of the temporal property, that is, the debts and goods of the deceased, but not of their wrongs, except where those wrongs operate to the temporal injury of the personal estate. And, in the excepted case, the special damage must be stated on the record.<sup>7</sup> According to other authorities, "the common law, in its noble charity, covered the wrongs with the oblivion of the grave, and would not suffer actions for them to be brought by or against an executor or administrator."<sup>8</sup>

There are cases in which, though the injury was to the person of the decedent, his representatives have been allowed to recover, not only for medical and other expenses, but for injury to the decedent's business resulting from his personal injuries.<sup>9</sup> But the weight of

<sup>1</sup> Hegerich v. Keddle, *supra*.

<sup>2</sup> *Ibid.*; Russell v. Sunbury, 37 Ohio St., 372; s. c., 41 Am. Rep., 523.

<sup>3</sup> Roberts v. Lisenbee, 86 N. C., 136; s. c., 41 Am. Rep., 450.

<sup>4</sup> Vallentine v. Norton, 30 Me., 201; Stillman v. Hollenbeck, 4 Allen, 391; Reed v. Cist, 7 S. & R., 184.

<sup>5</sup> Hawes on Parties to Action, s. 107, and citations.

<sup>6</sup> Chamberlain v. Williamson, 2 M. & S., 408.

<sup>7</sup> *Ibid.*

<sup>8</sup> Tyler's Stephen on Pleading, 31.

<sup>9</sup> Bradshaw v. R. R. Co., L. R., 10 C. P., 189; Potter v. R. R. Co., 30 L. T., N. S., 765; s. c., 32 *Ibid.*, 36; Tichenor v. Hayes, 41 N. J. L., 193; s. c., 32 Am. Rep., 186.



authority is, that, if the cause of action is for injury to the person, and property is merely incidentally affected, the action does not survive; while, *e converso*, if the injury is to property, to which personal injury is merely an incident, the action survives.<sup>1</sup> A husband's action for loss of the wife's services, expenses, etc., resulting from the negligence of a common carrier, for example, is founded in tort, and survives, if at all, only under special statutory provisions.<sup>2</sup> And the later and more correct doctrine seems to be that it is this distinction, namely, between causes of action which affect the estate, and those which affect the person only, and not the form of the action, which determines the question of survivability. Thus, where the question was whether an action for malpractice could be maintained against the personal representatives of a deceased surgeon, the contention in favor of the right to maintain being, the injury having resulted from a breach of the contract to render proper care and skill, that the action had arisen *ex contractu*, it was declared that where the action, whatever its form, is for damages for injuries to the person, it is abated by death; and that, on the other hand, an action, though in either form, may be revived against the personal representative where it is for injury to property.<sup>3</sup> So, in suits for breach of promise, a class of cases not only arising *ex contractu*, but in which there is clearly no element of tort, as distinguishable from mere refusal to perform, it seems always to have been held that the action does not survive, *unless* special damage of a pecuniary nature is averred and proved.<sup>4</sup> And such special damage must be something more than either the loss of property advantages which would have resulted from the marriage, or disadvantageous dispositions of the plaintiff's own property, made in contemplation of the marriage or upon the faith

<sup>1</sup> *Jenkins v. French*, 58 N. H., 532; *Wolf v. Woll*, 40 Ohio St., 111; *Wade v. Kalbfleisch*, 58 N. Y., 282; s. c., 17 Am. Rep., 250.

<sup>2</sup> *Cregin v. Brooklyn, etc.*, R. R. Co., 75 N. Y., 192; s. c., 31 Am. Rep., 459; s. c., 83 N. Y., 595; s. c., 38 Am. Rep., 474.

<sup>3</sup> *Boor v. Lowery*, 103 Ind., 468; s. c., with note, 53 Am. Rep., 519; *Vittum v. Gilman*, 48 N. H. 416.

<sup>4</sup> *Stebbins v. Palmer*, 1 Pick., 71; s. c., 11 Am. Dec., 146; *Smith v. Sherman*, 4 Cush., 408; *Kelly v. Riley*, 106 Mass., 339; s. c., 8 Am. Rep., 336; *Grubbs' Adm. v. Sult*, 32 Gratt., 203; s. c., 34 Am. Rep., 765; *Wade v. Kalbfleisch*, 58 N. Y., 282; s. c., 17 Am. Rep., 250; *Lattimore v. Simmons*, 13 Serg. & R., 183.

of it, but not as a part of the contract or at the instance of the other party to it.<sup>1</sup>

Assignability, according to some of the authorities, is a test of survivability; that is, if the cause of action is one which, under the rules of law, the decedent might, in his life-time, have assigned to another, it survives to his personal representatives, who are his legal assignees.<sup>2</sup> By assignability is meant that power equitably to assign which enables the assignee to sue in the name of the assignor to his own use at common law, or to sue in his own name under code provision in the States which have adopted codes.<sup>3</sup>

Recent statutes, both in England and in a majority of the States, have altered the common law, which allowed no recovery for the death of a human being, even to his nearest and most dependent relatives. These statutes usually provide that an action may be maintained by the personal representatives of the decedent, where death has been caused by the carelessness, negligence or default of another, for the benefit of the wife, husband, child, parent, or other specified relative, in such shares as the jury shall direct. Where such statutory action is given, the personal representative may sue in another State from that in which the injury was received, if the laws of the two States are either precisely the same or similar.<sup>4</sup> If the common law rule has not been altered in the *lex fori*, the action cannot be maintained there.<sup>5</sup>

On the question whether action for trespass on real estate survives for and against personal representatives, see the authorities cited below.<sup>6</sup>

Where the plaintiff in an action *ex delicto* dies after judgment in his favor and pending an appeal to reverse it, the judgment is not vacated, though if, upon the hearing of the appeal, the judgment

<sup>1</sup> Chase v. Fitz, 132 Mass., 359.

<sup>2</sup> Brackett v. Griswold, 103 N. Y., 425; see also McKee v. Judd, 12 N. Y., 622; Zabriskie v. Smith, 13 N. Y., 322; s. c., 64 Am. Dec., 551.

<sup>3</sup> Snyder v. Wabash, etc., R. R. Co, 86 Mo., 613; Butler v. N. Y. & Erie R. R. Co., 22 Barb., 110.

<sup>4</sup> Leonard v. Col. Steam Nav. Co., 84 N. Y., 51; s. c., 38 Am. Rep., 491; Buckles v. Ellers, 72 Ind., 220; s. c., with note, 37 Am. Rep., 156.

<sup>5</sup> Allen v. P. & C. R. R. Co., 45 Md., 44; Selma, etc., R. R. Co. v. Lacy, 43 Ga., 461; Richardson v. N. Y. Central R. R. Co., 98 Mass., 85; Needham v. G. T. R. R. Co., 38 Vt., 295; Marcy v. Marcy, 32 Conn., 314.

<sup>6</sup> Ellington v. Bennett, 56 Ga., 158; Farish v. Androscoggin Co., 52 N. H., 477.

should be reversed, the cause of action would abate.<sup>1</sup> If judgment for the plaintiff has been reversed by an intermediate tribunal, his appeal from the judgment of reversal is not abated by his death. Death between verdict and judgment does abate the action,<sup>2</sup> unless delay has intervened at the court's instance, or with its privity, as by hearing argument or advisement upon points of law, in which case it may cause the judgment to be entered *nunc pro tunc*, as in the lifetime of the deceased.<sup>4</sup>

Abatement of actions *ex delicto* may be prevented by stipulation between the parties, or by the imposition of terms by the court, as where a continuance, or a new trial, is granted upon stipulation, or terms upon the party seeking it, that death shall not abate.<sup>5</sup>

<sup>1</sup> Carroll v. Bowie, 7 Gill, 34; Danforth v. Danforth, 111 Ill., 236; Atlantic Dock Co. v. Mayor, 53 N. Y., 64; Shafer v. Shafer, 30 Mich., 163; Thompson v. Central R. R. Co., 60 Ga., 120; Akers v. Akers, 16 Lea (Tenn.), 7.

<sup>2</sup> Lewis v. St. Louis, etc., R. R. Co., 59 Mo., 495; Wood v. Phillips, 11 Abb. Pr., N. S., 1.

<sup>3</sup> Ireland v. Champneys, 4 Taunt., 885; Moore v. Bennett, 65 Barb., 338.

<sup>4</sup> Kelly v. Riley, 106 Mass., 341; Gaines v. Coon, 2 Dana., 231; Troycross v. Grant, 4 Com. Pl. Div., 40; Rightmire v. Durham, 4 Wend., 245.

<sup>5</sup> Griffith v. Williams, 1 Cromp. & J., 47; Palmer v. Cohen, 2 B. & A., 966; Ames v. Webber, 10 Wend., 576; Cox v. N. Y. Cent. R. R. Co., 63 N. Y., 415.

## CHAPTER II.

### OF CONTRACTS.

PERSONAL actions, we have observed,<sup>1</sup> may be brought not only on account of the infliction of a wrong, but also to recover pecuniary damages for the non-performance of a contract, or to procure the payment of money due, if the payment of a specific sum be the subject of the contract. As the payment of money is the law's ultimate remedy in personal actions, an action for a given debt will be effectually satisfied by a judgment that the plaintiff do recover his debt; and this is the judgment accordingly given in an action of debt, which lies for the recovery of a specific sum due from the defendant to the plaintiff.<sup>2</sup> But when no specific sum is claimed, the action can only, in the law phrase, *sound in damages*; and the amount of the damages to be recovered must be assessed by a jury according to the injury sustained.<sup>3</sup> It is, however, competent to the parties to a contract to agree between themselves, that, in the event of a breach by either party, a given sum shall be recovered from him by the other as stipulated or liquidated damages; and in this case the whole of the sum thus agreed on may, on a breach of the contract, be recovered from the defaulter.<sup>4</sup> The sum so agreed on is not properly called a penalty; for, as we shall see hereafter when speaking of bonds, the law regards a penalty as a security only for the damage actually sustained; although the use of the word *penalty* will not prevent the whole sum from being recovered, if this be clearly the intention.<sup>5</sup> But where a sum of money is stipulated to be recovered as liquidated damages in case of the breach of an agreement to do several acts,

<sup>1</sup> *Ante*, p. 7.

<sup>2</sup> Stephen on Pleading, 116.

<sup>3</sup> *Ibid.*, 117.

<sup>4</sup> *Reilly v. Jones*, 1 Bing., 302 (8 E. C. L.); s. c., 8 Moore, 244; *Sugd. Vend. & Pur.*, 221, 11th ed.; *Leighton v. Wales*, 2 M. & W., 545; *Price v. Green*, 16 M. & W., 346, 354; *Galsworthy v. Strutt*, 1 Exch. Rep., 659; *Atkyns v. Kinnier*, 4 Exch. Rep., 776.

<sup>5</sup> *Sainter v. Ferguson*, 7 C. B., 716 (62 E. C. L.); *Sparrow v. Paris*, 7 H. & N., 594.

and such sum will, in case of breaches of the agreement, be in some instances too large and in others too small a compensation for the injury occasioned, such sum will not be allowed to be recovered in case of any breach, but damages only, proportioned to the actual injury which the breach has occasioned.<sup>1</sup> In such a case, if the parties wish to bind themselves to pay liquidated damages, they must contract, in clear and express terms, that for the breach of each and every stipulation contained in the agreement a sum certain is to be paid; and in that case, although the stipulations may be of various degrees of importance, the parties will be held to their contract.<sup>2</sup>

So much, then, for the legal remedies for a breach of contract. Let us now inquire more particularly of what a contract itself consists. A contract, as defined by Blackstone,<sup>3</sup> is "an agreement upon sufficient consideration to do or not to do a particular thing." This agreement may be either express or implied; for the law always implies a promise to do that which a person is legally liable to perform, and the action of *assumpsit* on promises is constantly maintained for damages for the breach of such an implied contract.<sup>4</sup> Thus, a person who takes the goods of a tradesman is liable in *assumpsit* for their market value; for, as he took the goods, the law will imply for him a promise to pay for them. So, a person who employs another to work for him impliedly contracts to give him reasonable remuneration; and a man who borrows money impliedly promises to repay it. And in all these cases the plaintiff, in his declaration, plainly states that the defendant promised the plaintiff to pay the money on request, and that the defendant has disregarded his promise, and has not paid the said moneys, or any part thereof.

<sup>1</sup> *Kemble v. Farren*, 6 Bing., 141 (19 E. C. L.); s. c., 3 M. & P., 425; *Davies v. Penton*, 6 B. & C., 216, 223 (13 E. C. L.), s. c., 9 Dowl. & Ry., 369; *Horne v. Flintoff*, 9 M. & W., 678, 781; *Reindell v. Schell*, 4 Scott, N. S., 97; *Betts v. Burch*, 4 H. & N., 506.

<sup>2</sup> Per Parke, B., 9 M. & W., 680. See *Atkins v. Kinnier*, 4 Exch. Rep., 776; *Mercer v. Irving*, 1 E. B. & E., 563 (96 E. C. L.).

For collocation and discussion of the authorities upon the subject of liquidated damages and upon the distinction between stipulations for such damages and penalties, too large for consideration here, see Sodgwick on the Measure of Damages, 397 *et seq.*; Sutherland on Damages, vol. 1, 457, *et seq.*; 3 Pars. on Contracts, 166 *et seq.* <sup>3</sup> 2 Bla. Com., 442. <sup>4</sup> Stephen on Pleading, 18.

Express contracts are either by parol, or word of mouth, which are called *simple contracts*; or by deed under seal, which are called *special contracts*;<sup>1</sup> although simple contracts may, and often must at the present day, be evidenced by writing. Let us consider first mere parol or simple contracts. A parol contract, then, is an agreement by word of mouth, upon sufficient consideration, to do or not to do a particular thing. According to the law of England, a *consideration* is an essential ingredient in every contract: a promise without consideration is regarded as *nudum pactum*, and no recompense can be recovered for its breach,<sup>2</sup> neither will its performance be enforced in a court of equity.<sup>3</sup> Thus, if a man promise to give me 100*l.* without any consideration, he is not bound to perform his promise, and I am without remedy if he should break his word. So, even if I should have done him any service, his subsequent promise to pay me money, or otherwise benefit me, for a consideration already executed on my part, will not be binding, unless I should have done him the service at his request, in which case the promise will relate back to the request;<sup>4</sup> or unless a request can be implied from a subsequent allowance of the service, or from other circumstances;<sup>5</sup> and if the service rendered be of such a nature that the law will imply a promise in respect of it, any subsequent express promise, different from that which the law will imply will be void as *nudum pactum*.<sup>6</sup> And if the service, or any part of it, has been illegal, from being contrary to the common law or to any statute, such illegal consideration will not support a promise. Thus a promise made in consideration that the other party had published a libel at the request of the person making the promise, and had also at the like request incurred costs, was held void on account of the illegality of part of the consideration, namely, publishing the libel, which vitiated the whole.<sup>7</sup> And, in

<sup>1</sup> *Rann v. Hughes*, 7 Term Rep., 351, n.

<sup>2</sup> *Doctor v. Student*, dial. 2, c. 24; 2 Bla. Com., 445.

<sup>3</sup> 1 Fonb. Eq., 335 *et seq.*; *Dipple v. Corles*, 11 Hare, 183.

<sup>4</sup> *Hunt v. Bate*, Dyer, 272 a; *Lampleigh v. Brathwait*, Hob., 105; s.c., *Smith's Leading Cases*, 9th Amer. ed., 281; *Pawle v. Gunn*, 4 Bing., N. C., 445, 448 (33 E. C. L.); *Eastwood v. Kenyon*, 11 Ad. & E., 438, 451 (39 E. C. L.); s. c., 3 Per. & Dav., 282; 1 Wms. Saund., 264, n. (1).

<sup>5</sup> The maxim is *omnis ratihabito retrotrahitur et mandato æquiparatur*: 1 Wms. Saund., 264 b. n.

<sup>6</sup> *Hopkins v. Logan*, 5 M. & W., 241, 247.

<sup>7</sup> *Shackell v. Bosier*, 2 Bing., N. C., 634, 644 (29 E. C. L.).

like manner, the circumstances of a woman's having cohabited with a man is not of itself a valid consideration to support a promise made by him to pay her a sum of money.<sup>1</sup>

Considerations are divided in law into two classes, *good* (sometimes called meritorious) and *valuable*. A good consideration is that of *blood*, or the natural love and affection which a person has to his children, or any of his relatives.<sup>2</sup> A valuable consideration may be either pecuniary, namely, the payment of money; or the gift or conveyance of anything valuable; or it may be the consideration of the marriage of the party himself or of any relative;<sup>3</sup> or the compromise of a *bona fide* claim;<sup>4</sup> or any act of one party from which the other, or any stranger at his request, express or implied, derives any advantage; or any labor, detriment, inconvenience or risk sustained by the one party, if such labor be performed, or such detriment, inconvenience or risk be suffered, by the one party at the request, express or implied, of the other, although such other may himself derive no actual benefit.<sup>5</sup> A good consideration is not of itself sufficient to support a promise, any more than the moral obligation which arises from a man's passing his word; neither will the two together make a binding contract; thus a promise by a father to make a gift to his child will not be enforced against him.<sup>6</sup> The consideration of natural love and affection is, indeed, good for so little in law that it is not easy to see why it should be called a *good* consideration; for in law it is considered as not good against creditors within the statute 13 Elizabeth,<sup>7</sup> in which the very phrase *good consideration* is used; it is not good to support a contract; and a gift for such con-

<sup>1</sup> *Binnington v. Wallis*, 4 B. & Ald., 650, 652 (6 E. C. L.). See however *Gibson v. Dickie*, 3 M. & Selw., 463; *Keenan v. Handley*, 2 DeG., J. & S., 283.

<sup>2</sup> 2 Black. Com., 297, 444.

<sup>3</sup> *Champion v. Cotton*, 17 Ves., 263; *Fraser v. Thompson*, 1 Giff., 49, 65; reversed on appeal, 4 DeG. & J., 659.

<sup>4</sup> *Lucy's Case*, 4 DeG., M. & G., 356; *Cook v. Wright*, 1 B. & S., 559 (101 E. C. L.)

<sup>5</sup> *Selwyn's Nisi Prius*, tit., *Assumpsit*, 46; 1 Wms. Saund., 211 d, n, (2); 2 Wms. Saund., 137 h, n. (e).

<sup>6</sup> *Jeffery v. Jeffery*, 1 Craig & Ph., 138; *Dillon v. Coppin*, 4 Myl. & Cr., 647; *Holloway v. Haddington*, 8 Sim., 324; *Meek v. Kettlewell*, 1 Hare, 463; s. c. 1 Phil. 342. See, however, *Ellis v. Nimmo*, Lloyd & Gould, 333.

<sup>7</sup> *Twyne's Case*, 3 Rep., 80 b; s. c., Sm. L. C., 9th Am. ed., 1; *ante*, p. 97.

sideration is regarded as simply voluntary.<sup>1</sup> The only reason why such a consideration should be called *good* appears to be that, in early times, previously to the passing of the Statute of Uses,<sup>2</sup> the Court of Chancery enforced a covenant to stand seized of lands to the use of any person of the blood of the covenantor, on account of the goodness of the consideration; whence it has happened that, since that statute, the legal estate (being by that statute annexed to the use)<sup>3</sup> will pass to a relative under a covenant to stand seized to his use.<sup>4</sup> But the rules that anciently governed the Court of Chancery do not now regulate its proceedings;<sup>5</sup> although modern equity will still interfere in favor of a wife or child in some cases in which it will not interpose on behalf of strangers.<sup>6</sup>

A valuable consideration is, therefore, in all cases necessary to form a valid contract. It has, indeed, been thought that an express promise, founded on a moral obligation, is sufficient for this purpose.<sup>7</sup> This, however, appears to be a mistake. An express promise can give no original right of action, if the obligation on which it is founded could never itself have been enforced.<sup>8</sup> But in some cases a valuable consideration, which might have formed a contract by means of an implied promise had its operation not been suspended by some positive rule of law, may be revived and made available by a subsequent express promise. Thus a debt barred by the debtor's having become bankrupt and obtained his certifi-

<sup>1</sup> 2 Black. Com., 297.

<sup>2</sup> 27 Hen. VIII., c. 10.

<sup>3</sup> Williams' Real Property, 126, *et seq.*, 2d ed.; 131, 3d & 4th es.; 136, 5th ed.; 143, 6th ed.; 147, 7th ed.; 153, 8th ed.; 6th Am. ed., 130.

<sup>4</sup> *Ibid.*, 159, 2d ed.; 164, 3d ed.; 166, 4th ed.; 173, 5th ed.; 181, 6th ed.; 185, 7th ed.; 194, 8th ed.; 6th Am. ed., 164.

<sup>5</sup> *Ibid.*, 131, 2d ed.; 135, 3d and 4th eds.; 141, 5th ed.; 148, 6th ed.; 151, 7th ed.; 157, 8th ed.; 6th Am. ed., 134-136.

<sup>6</sup> *Ibid.*, 239, 2d ed.; 246, 3d ed.; 248, 4th ed.; 258, 5th ed.; 270, 6th ed.; 276, 7th ed.; 288, 8th ed.; 6th Am. ed., 257, 258.

<sup>7</sup> *Lee v. Muggerridge*, 5 Taunt., 36 (1 E. C. L.). This case may now be considered as virtually overruled by subsequent authorities mentioned in the next note. See, however, *Dawson v. Kearton*, 3 Sm. & G., 190, *quære*.

<sup>8</sup> Note to *Wennall v. Adney*, 3 Bos. & Pul., 252; *Littlefield v. Shee*, 2 B. & Ad., 811 (22 E. C. L.); *Meyer v. Haworth*, 8 Ad. & E., 467 (35 E. C. L.); s. c., 3 N. & P., 462; *Monkman v. Shepherdson*, 11 Ad. & E., 411, 415 (39 E. C. L.); s. c., 3 Per. & Dav., 182; *Jennings v. Brown*, per Parke, B., 9 M. & W., 501; *Eastwood v. Kenyon*, 11 Ad. & E., 447 (39 E. C. L.); s. c., 3 Per. & D., 276; 2 Wms. Saund., 137 f. n. (c); *Beaumont v. Reeve*, 8 Q. B., 483 (55 E. C. L.).



cate, may be enforced against him, if, after his bankruptcy, he has expressly promised to pay it.<sup>1</sup> So a simple contract debt, which would otherwise have been barred by the Statute of Limitations,<sup>2</sup> from having been incurred upwards of six years, may be revived by a subsequent promise to pay, or even by an unconditional acknowledgment of the debt.<sup>3</sup> And in like manner a debt incurred or contract made by a person during infancy, and voidable on that account, may be confirmed by an express promise or ratification made when of full age.<sup>4</sup>

By the ancient common law, every legal instrument in writing was a deed sealed and delivered;<sup>5</sup> and, in accordance with this circumstance, contracts are, as we have seen,<sup>6</sup> now divided in law into two kinds only, namely, *parol* (that is verbal) or *simple* contracts, and *special* contracts made by deed. But, as the art of writing became general, many *parol* contracts were, for greater certainty, put into writing, though not made by deed; and, by some statutes of modern times, writing is required to most simple contracts respecting matters of importance. These statutes we shall now proceed to notice, premising that, in all cases where writing is by any statute made necessary to a contract, the contract is still a *parol* one, though evidenced by the writing;<sup>7</sup> but that, when a contract is made by deed, the *deed itself* is the contract.<sup>8</sup> The first and most important statute, then, by which writing is required to many agreements, is the Statute of Frauds,<sup>9</sup> which enacts in its fourth section that no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person;

<sup>1</sup> *Trueman v. Fenton*, Cowp., 544; *Kirkpatrick v. Tattersall*, 13 M. & W., 766.

<sup>2</sup> Stat. 21 Jac. I., c. 16, s. 3.

<sup>3</sup> Bac. Abr. tit., Limitations and Actions (E.); *Prance v. Sympson*, 1 Kay, 678; *Sidwell v. Mason*, 2 H. & N., 306-310; *Holmes v. Mackrell*, 3 C. B., N. S., 789 (91 E. C. L.); *Cornforth v. Smithard*, 5 H. & M., 13; *Francis v. Hawkesley*, 1 E. & E., 1052 (102 E. C. L.).

<sup>4</sup> Bac. Abr. tit., Infancy and Age (I), 8; *Williams v. Moor*, 11 M. & W., 256-263; *Harris v. Wall*, 1 Ex. Rep., 122.

<sup>5</sup> See *Williams' Real Property*, 118, 2d ed.; 123, 3d & 4th eds.; 128, 5th ed.; 134, 6th ed.; 137, 7th ed.; 144, 8th ed.; 6th Am. ed., 121.

<sup>6</sup> *Ante*, p. 115.

<sup>7</sup> *Sug. Vend. and Pur.*, 115, 13th ed.

<sup>8</sup> *Dyer*, 305 a; *Byron v. Byron*, Cro. Eliz., 472; 1 Wms. Saund., 274 a, n. (3).

<sup>9</sup> 29 Car. II., c. 3.

or to charge any person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. This enactment, it will be observed, does not give to writing any validity which it did not possess before. A written promise made since this statute, without any consideration, is quite as much *nudum pactum* as it would have been before.<sup>1</sup> The statute merely adds a further requisite to the validity of certain contracts, namely, that they shall, besides being good in other respects, be put into writing, otherwise no action shall be maintained upon them.

A great number of cases have been decided upon the above section of this celebrated statute. One of the most important is that of *Wain v. Warlters*,<sup>2</sup> in which it was held that the statute, in requiring the *agreement* to be in writing, required that the *consideration*, which is part of the agreement, should be in writing, as well as the promise itself. And, therefore, a promise in writing to pay the debt of a third person, which did not state any consideration, was held to give no cause of action; and parol evidence of a consideration was not allowed to be given. This case was followed by many other decisions to the same effect.<sup>3</sup>

The decision in *Wain v. Warlters* was founded upon the fact that, under the phraseology of the fourth section of the statute, the *agreement*, or some note or memorandum thereof, is required to be in writing, which term *agreement*, *aggregatio mentium*, was construed to comprehend that which "each party is to do or perform, and by which both parties are to be bound;" or, in other words, as being equivalent to the word contract and including all the

<sup>1</sup> See Williams on Executors, pt. 4, bk. 2, ch. 2, sect. 2; 1 Wms. Saund., 211, n. (2).

<sup>2</sup> 5 East, 10; s. c., Smith's Leading Cases, 9th Am. ed., 1495.

<sup>3</sup> Saunders v. Wakefield, 4 B. & Ald., 595 (6 E. C. L.); Morley v. Boothby, 3 Bing., 107 (11 E. C. L.); Clancy v. Piggott, 2 Ad. & E., 473 (29 E. C. L.); Wain v. Warlters, Smith's Leading Cases, 9th Am. ed., note, 1526, 1527; 1 Wms. Saund., 211, n. (d); Price v. Richardson, 15 M. & W., 539.

essential elements of a contract, one of which is a consideration. In *Egerton v. Matthews*,<sup>1</sup> decided the following year, it was held that, in contracts covered by the seventeenth section, which provides for a note or memorandum, not of the agreement, but "of the said bargain," the consideration need not be stated, a decision which has ever since been adhered to, both in England and America. That case, however, really called for no such distinction between the two terms, or between the two sections in question. The memorandum sued upon was the defendant's agreement to give the plaintiff "19d. per lb. for 30 bales of Smyrna cotton," etc. The objection taken on behalf of the defendants was that no consideration for their promise appeared in the memorandum; but, as pointed out by Parke, J., in *Jenkins v. Reynolds*,<sup>2</sup> the consideration for the defendant's undertaking to pay did sufficiently appear from the memorandum, namely, the delivery of the goods; and the objection really appears to have been only that the memorandum was not signed by the plaintiff, which, by the great preponderance of authority, is immaterial, either at law or in equity.<sup>3</sup> Under the fourth section, the memorandum need not show acceptance by the plaintiff of the defendant's offer, the fact of such acceptance being provable by oral evidence;<sup>4</sup> so that, had *Egerton v. Matthews* been an agreement for the sale of lands under the fourth section, instead of a bargain for the sale of goods under the seventeenth, the result of the case would have been the same. The question really was as to the necessity of binding mutuality in the memorandum and not as to the necessity of expressing in it the consideration.

In the United States, the decisions upon the question whether, under the fourth section of the statute, it is necessary that the memorandum state the consideration, though quite variant, are readily reducible into three classes, viz: 1st, those in which the doctrine of *Wain v. Warlters* has been adhered to, as in *New*

<sup>1</sup> 6 East, 307.

<sup>2</sup> 3 Brod. & Bing., 14.

<sup>3</sup> *Browne on Stat. of Frauds*, s. 36<sup>a</sup> and citations; *Ivory v. Murphy*, 36 Mo., 534; *Farwell v. Lowther*, 18 Ill., 252; *Vassault v. Edwards*, 43 Cal., 458; *Reynolds v. O'Neil*, 26 N. J. Eq., 223; *McCrea v. Purmort*, 16 Wend., 460; s. c., 30 Am. Dec., 103; *Blair v. Snodgrass*, 1 Sneed, 1; *Worrall v. Munn*, 1 Seld., 229, 246 and citations; *Luchett v. Williamson*, 37 Mo., 388, 395 and citations; *Rutenberg v. Main*, 47 Cal., 213; *Esway v. Gorton*, 18 Ill., 483; *Reed on Stat. of Frauds*, s. 363, 365.

<sup>4</sup> *Brown on Stat. of Frauds*, s. 345 *a* and citations.

York, New Jersey, Delaware, California,<sup>1</sup> Maryland, Georgia, Illinois, Michigan, Wisconsin and Minnesota; 2d, those in which, although the phraseology of the local statute accords with that of the English act, the doctrine of *Wain v. Warlters* has been rejected, as in Maine, Vermont, Connecticut, Massachusetts, North Carolina, Ohio and Missouri; 3d, those in which the substitution of the word "promise" for "agreement," or the employment of both of those terms, disjunctively connected, in the local statutes, has been made the basis of distinction and departure from the rule laid down in *Wain v. Warlters*, as in a majority of the States not named above.<sup>2</sup>

Even under the English rule, the consideration need not be expressed in words, if it may be collected or fairly inferred from the words of the instrument; as, for example, "I guaranty the payment for such goods as A. may deliver to B." So, where a guaranty is made at the same time with the principal contract, and is the ground of the original credit given, no consideration need appear in the writing, being clearly inferable from the nature of the transaction.<sup>4</sup> The phrase in the statute, to *answer for* the debt, default or miscarriage of another person, means to answer for a debt, default or miscarriage *for which that other remains liable*.<sup>5</sup> Thus where one party to an agreement verbally promised the other that, in consideration of his discharging from custody a third person whom he had taken in execution for debt, he, the first party, would pay the debt, it was held that action might well be brought on this promise, although it was not put in writing.<sup>6</sup> For this was not a promise to answer for the debt of another person, to which that other remained liable, but to pay a debt from which the other was discharged. It was an original promise to pay and not a

<sup>1</sup> *Ellison v. Jackson*, 12 Cal., 552.

<sup>2</sup> See *Browne on Stat. of Frauds*, s. 391. New Hampshire, included by that author among the first of the classes named, would seem to belong to the last: *Britton v. Angier*, 48 N. H., 421.

<sup>3</sup> *Browne on Stat. of Frauds*, s. 399, *et seq.*

<sup>4</sup> 3 Kent Com., 122.

<sup>5</sup> *Forth v. Stanton*, 1 Wm. Saund., 211 b, n. (2); *Birkmyr v. Darnell*, Smith's *Leading Cases*, 9th Am. ed., 522; *Green v. Cresswell*, 10 Ad. & E., 453 (37 E. C. L.); s. c., 2 Per. & Dav., 430; *Cripps v. Hartnol*, Ex. Ch. 11 W. R., 953; s. c., 32 L. J. Q. B., 381; 10 Jur. N. S., 200.

<sup>6</sup> *Goodman v. Chase*, 1 B. & Ald., 297. See also *Lane v. Burghart*, 1 Q. B., 933 (41 E. C. L.).

collateral promise to guarantee, which is the meaning in the statute of the words "answer for." The words, "any agreement that is not to be performed within the space of one year from the making thereof," have been held to mean an agreement which appears from its terms incapable of performance within the year. Thus where one man promised another, for one guinea, to give him a certain number on the day of his marriage, it was held that a writing was unnecessary, for the marriage might have happened within the year.<sup>1</sup> So a contract by A. that his executor shall pay 10,000*l.*, need not be in writing;<sup>2</sup> for the death of A. and the payment of the money may all take place within a twelvemonth. It has also been held that, in order to bring an agreement within this clause of the statute, so as to render writing necessary, both parts of the agreement must be such as are not to be performed within a year from the making thereof. Thus where a landlord agreed to lay out 50*l.* in improvements, in consideration of the tenant undertaking to pay him 5*l.* a year during the remainder of his term (of which several years were unexpired), it was held that writing was unnecessary;<sup>3</sup> for, although the tenant's part of the agreement was not to be performed within a year, the landlord's part might reasonably have been so. These decisions have considerably narrowed the operations of the statute, and have left remaining much of the mischief arising from reliance on memory only, which it was the intention of the statute to obviate, by requiring written evidence.<sup>4</sup> The last clause of the enactment has, however, received a very liberal construction. The words are "signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." And it has been held that any insertion by the party of his name in any part of the agreement is a sufficient signing within the statute,<sup>5</sup> provided the name be inserted in such a manner as to have the effect of authenticating the instrument;<sup>6</sup>

<sup>1</sup> *Peter v. Compton*, Skin., 353; s. c., *Smith's Leading Cases*, 9th Amer. ed., 586; *Souch v. Strawbridge*, 2 C. B., 808 (52 E. C. L.).

<sup>2</sup> *Wells v. Horton*, 4 Bing., 40 (13 E. C. L.); *Ridley v. Ridley*, 34 Beav., 478.

<sup>3</sup> *Donellan v. Reid*, 3 B. & Ad., 899 (23 E. C. L.); *Cherry v. Heming*, 4 Ex. Rep., 631.

<sup>4</sup> See *Smith's Leading Cases*, 9th Am. Ed., 544, *et seq.*

<sup>5</sup> *Ogilvie v. Foljambe*, 3 Meriv., 62.

<sup>6</sup> *Stokes v. Moor*, 1 Cox, 219; *Selby v. Selby*, 3 Meriv., 4, 6.

and it is not necessary that both parties should sign the agreement. The whole of the agreement must be contained in the writing, either expressly or by reference to some other document, but the writing is required by the statute to be signed only by the party to be charged.<sup>1</sup> And as a "memorandum or note" of the agreement is allowed, a writing sufficient to satisfy the statute may often be made out from letters written by the party;<sup>2</sup> or from a written offer, accepted, without any variation,<sup>3</sup> before the party offering has exercised his right of retracting;<sup>4</sup> and, when correspondence is carried on by means of the post, an offer is held to be accepted from the moment that a letter accepting the offer is put into the post, although it may never reach its destination.<sup>5</sup>

The seventeenth section of the Statute of frauds, which relates to contracts for the sale of goods, wares and merchandise for the price of 10*l.* or upwards, has been already noticed.<sup>6</sup>

In addition to those contracts which, by statute, are required to be in writing, there exists a peculiar class of contracts, which in their nature are expressed in writing, and for which a consideration is presumed to have been given till the contrary is proved.<sup>7</sup> These are bills of exchange and promissory notes.<sup>8</sup> A bill of ex-

<sup>1</sup> *Laythoarp v. Bryant*, 2 Bing., N. C., 735, 742 (29 E. C. L.). See *Sugd. Vend. & Pur.*, c. 4, s. 3, 4, 102 *et seq.*, 13th ed.

<sup>2</sup> *Owen v. Thomas*, 3 Myl. & K., 353.

<sup>3</sup> *Holland v. Eyre*, 2 Sim. & Stu., 194; *Gibbons v. North-Eastern Metropolitan Asylum District*, 11 Beav., 1.

<sup>4</sup> *Routledge v. Grant*, 4 Bing., 653 (13 E. C. L.); s. c., 1 Moo. & P., 717; *Gilkes v. Leonino*, 4 C. B. N. S., 485 (93 E. C. L.); *Hebb's Case*, M. R., Law Rep., 4 Eq., 9.

<sup>5</sup> *Dunlop v. Higgins*, 1 H. of L. C., 481; *Duncan v. Topham*, 8 C. B. 225 (65 E. C. L.).

<sup>6</sup> *Ante*, pp. 91-93.

The remaining statutes discussed in the original text as making writing necessary to the validity or actionable character of certain simple contracts were enacted subsequently to the separation of the American States from Great Britain and are, therefore, here omitted. They relate, principally, to new promises or acknowledgments relied upon to take simple contracts out of the operation of the Statute of Limitations, and to representations or assurances as to the credit, ability etc., of another, made with intent to enable such other to obtain credit, goods or money. Similar statutes in reference to new promises or acknowledgments have been enacted in a number of our States.

<sup>7</sup> See *Mills v. Barber*, 1 M. & W., 425.

<sup>8</sup> See *Byles on Bills*; and *Bayley on Bills*.

change is a written order from one person to another to pay to a third person, or to his order, or to the bearer, a certain sum of money. The person making the order is called the drawer, the person on whom it is made the drawee, and the person to whom the money is payable the payee. The bill is sometimes made payable to the drawer himself, or to his order, or to him or bearer. If the person on whom the bill is drawn undertakes to pay it, he writes on it the word "accepted," with his signature, and is then called the acceptor. A promissory note, or note of hand, as it is sometimes called, is a written promise from one person to pay to another, or to his order, or to bearer, a certain some of money. The person making the promise is called the maker of the note. Bills or notes payable to A. B., or order, are transferable by a written order indorsed thereon by A. B. The mere signature by A. B. of his name on the back, followed by the delivery of the bill or note,<sup>1</sup> is, however, sufficient for this purpose. This is called an indorsement in blank; and after such an indorsement, the bill or note, together with the right to sue upon it, may be transferred by mere delivery.<sup>2</sup> Any holder of the bill may, consequently, after such an indorsement, enforce payment to himself. The indorsement may, however, be special, as "Pay C. D., or order, A. B." And in this case the bill or note, in order to become transferable, must be indorsed by C. D. But if a bill be once indorsed in blank, it will always be payable to the bearer by any of the parties thereto, although it may subsequently be specially indorsed; but the special indorser will not be liable to the bearer without the indorsement of the person to whom he has specially indorsed it.<sup>3</sup> A bill or note payable to bearer is transferable by mere delivery without any indorsement.

The effect of accepting a bill, or making a promissory note, is to render the acceptor or maker primarily liable to pay the same to the person entitled to require payment. The effect of drawing a bill is to make the drawer liable to payment, if the acceptor make default. But in order to charge the drawer of a foreign bill, it must, by the custom of merchants, be protested by a notary public.<sup>4</sup> This protest is a declaration by him in due form that payment has

<sup>1</sup> *Bromage v. Lloyd*, 1 Ex. Rep., 32.

<sup>2</sup> *Peacock v. Rhodes*, 2 Dong., 333.

<sup>3</sup> *Smith v. Clarke*, 1 Peake, 295; *Walter v. McDonald*, 2 Ex. Rep., 527.

<sup>4</sup> *Gale v. Walsh*, 5 Term Rep., 239.

been demanded and refused. A protest, however, is unnecessary for an inland bill or promissory note.<sup>1</sup> The effect of indorsing a bill or note is to make the indorser also liable to payment, if the acceptor of the bill or maker of the note should make default. The indorsement operates as against the indorser as a new drawing of the bill by him.<sup>2</sup> An indorsement, however, may be made without recourse to the indorser, or “sans recours,” as it is generally expressed, in which case the indorser avoids all personal liability.<sup>3</sup> The drawer of a bill, or the indorser of a bill or note, will, however, be discharged from all liability, unless the person requiring payment should, within a reasonable time, give him notice that the bill or note has not been paid, or, as it is termed, has been dishonored, and give him to understand, either expressly or by implication, that he looks to him for payment.<sup>4</sup> In consequence of the consideration being presumed to have been given for every bill or note till the contrary is shown, it follows that if a bill or note should have been drawn, accepted or indorsed without any consideration, or for a consideration which is illegal, a *bona fide* holder for valuable consideration, or any indorsee from him, may, nevertheless, enforce payment, for when he took the security he was entitled to rely on the legal presumption of a proper consideration having been given.<sup>5</sup> It is stated by Sir William Blackstone,<sup>6</sup> “that every note, from the subscription of the drawer, carries with it an internal evidence of a good consideration.” This, however, appears to be a mistake. The law does not give this effect to bills of exchange and promissory notes in respect of the undertaking being evidenced by writing, but in order to strengthen and facilitate that commercial intercourse which is carried on through the medium of such securities.<sup>7</sup> On this ground the law allows these instruments to form an exception to the general rule that a consideration must be shown for every agreement, although evidenced by writing.

<sup>1</sup> *Windle v. Andrews*, 2 B. & Ald., 696.

<sup>2</sup> *Penny v. Innes*, 1 C., M. & R., 441.

<sup>3</sup> *Byles on Bills*, 117, 6th ed.

<sup>4</sup> *Hartly v. Case*, 4 B. & C., 339 (10 E. C. L.); *Byles on Bills*, 213 *et seq.*, 6th ed.

<sup>5</sup> *Collins v. Martin*, 1 Bos. & Pul., 651; *Morris v. Lee*, *Bayley on Bills*, 500; *Robinson v. Reynolds*, 2 Q. B., 196 (42 E. C. L.); *May v. Chapman*, 16 M. & W., 355.

<sup>6</sup> 2 Black. Com., 446.

<sup>7</sup> 1 Fonbl. Eq., 343, 344.



We now come to the second class of contracts, namely, special contracts, or contracts by deed. These contracts differ from mere simple contracts in the following important particular, that they of themselves import a consideration,<sup>1</sup> whilst in simple contracts a consideration must be proved. For the law presumes that no man will put his seal to a deed without some good motive. And when an agreement is once embodied in a deed, such deed becomes itself the agreement, and not evidence merely, as is the case when a parol agreement is reduced to writing. On this principle it appears to be that, after a deed has been executed, any alteration, erasure or addition made in any material point, even by a stranger, will render the deed void.<sup>2</sup> It is true that by recent decisions<sup>3</sup> this doctrine has been extended to a mere written agreement; but, although it is no doubt highly important that all legal instruments should be preserved in their integrity, it may perhaps be doubted whether the doctrine in question would ever have existed, had there been no other reason for it than the duty of a person, having the custody of an instrument made for his benefit, to preserve it in its original state.

There are four classes of cases in which the question as to the effect of the unauthorized alteration of written contracts, whether special or simple, arises, viz.: first, where the party, who made the unauthorized alteration, seeks to enforce it; secondly, where the alteration was made by the agent of the party seeking to enforce it, created by the latter custodian of the instrument; thirdly, where the alteration was made by the party against whom it is sought to be enforced; and, fourthly, where the alteration is either accidental, or made by a stranger to the agreement.

In the first place, where the party guilty of altering the instrument seeks to enforce it, all the authorities agree that he can neither enforce it in its altered shape, because that is not the contract which the defendant made, nor in the shape it bore before the

<sup>1</sup> 1 Fonbl. Eq., 342.

<sup>2</sup> See Williams' Real Property, 118, 2d ed.; 123, 3d and 4th eds.; 128, 5th ed.; 134, 6th ed.; 137, 7th ed.; 143, 8th ed.; 6th Am. ed., 120, 121.

<sup>3</sup> Pigot's Case, 11 Rep., 27 a.

<sup>4</sup> Davidson v. Cooper, 13 M. & W., 343, 352; Mollett v. Wackerbarth, 5 C. B., 181 (57 E. C. L.). It is now held that immaterial alterations, though made by party to an instrument, do not render it void: Aldous v. Cornwell, Law Rep., Q. B., 573.

alteration, since, if the rule were otherwise, persons might be encouraged to make alterations which would benefit them if undiscovered, and which would not injure them if detected. As the courts say, in a leading case upon the subject,<sup>1</sup> "no man shall be permitted to take the chance of committing a fraud, without any risk of losing by the event when it is detected."

There are authorities to the effect that, although the instrument is rendered void by the alteration, so that no action can be brought upon it in either its original or its altered form, yet recovery may be had upon the original consideration.<sup>2</sup> The weight of authority, however, is decidedly, and properly, the other way.<sup>3</sup> But where the alteration is made without fraudulent intent, though it avoids the instrument, there may be recovery upon the original consideration.<sup>4</sup>

In the second place, where the instrument is committed by one of the parties to the custody of an agent, and the latter makes an alteration, the general rule is that the same results follow as if made by the principal. He is held responsible for the tort of his agent, to the same extent as if made by himself.<sup>5</sup> This rule, however, is not, generally, very rigidly enforced. Thus, it has been held not to apply where the alteration is made by the agent, without authority, before the paper has reached the hands of the principal;<sup>6</sup> while authorities exist which seem to bind the principal only where the agent had authority to alter.<sup>7</sup>

In the third case, where the party against whom the remedy is

<sup>1</sup> *Master v. Miller*, 4 T. R., 320; s. c., Sm. L. C., 9th Am. ed., 1115.

<sup>2</sup> *Sutton v. Toomer*, 7 B. & C., 416; *Atkinson v. Hawdon*, 2 A. & E., 628; *Morrison v. Welty*, 18 Md., 169.

<sup>3</sup> *Wood v. Steele*, 6 Wall., 80; *Chadwick v. Eastman*, 53 Me., 12; though not if altered by a stranger, *Bigelow v. Stilphens*, 35 Vt., 521; *Bishop on Contracts*, 2d Edition, s. 757.

<sup>4</sup> *Hunt v. Gray*, 35 N. J. L., 227; s. c., 10 Am. Rep. 232; *State Savings Bank v. Shaffer*, 9 Neb., 1.

<sup>5</sup> *Pattinson v. Luckley*, L. R., 10 Ex., 330; *Bigelow v. Stilphens*, 35 Vt., 521; *Morrison v. Welty*, 18 Md., 169.

<sup>6</sup> *Morrison v. Welty*, *supra*; *Bigelow v. Stilphens*, *supra*; but see *Hamilton v. Hooper*, 46 Iowa, 515; s. c., 26 Am. Rep. 161.

<sup>7</sup> *Hunt v. Gray*, 35 N. J. L., 227; s. c., 10 Am. Rep., 232; *Bishop on Contracts*, s. 754, citing *Coburn v. Webb*, 56 Ind., 96; s. c., 26 Am. Rep., 15; *Lemay v. Williams*, 32 Ark., 166; *Nickerson v. Swett*, 135 Mass., 514; *Flinn v. Brown*, 6 s. c., 209, 214.

sought is guilty of the alteration, the other party may enforce the instrument in either its original or its altered form, as he may prefer, or he may repudiate it altogether.<sup>1</sup> But he can not repudiate it in part, and claim under it in part. Thus, in a building contract, where the architect, who was custodian of the agreement as agent of the owner, added without authority a stipulation that no extra work could be charged for unless ordered in writing, it was held that the alteration could not enable the builder to sue for work done without having first obtained the architect's certificate as to the fact and manner of its performance as required by the contract in its original form. To repudiate it altogether would place him in the position of having built a house upon the land of another without any contract at all; while, if he would sue upon the contract under which the work was done, he must sue upon it as actually made, and subject to all the restrictions which it originally contained.<sup>2</sup>

Fourthly, where the alteration is the result either of accident or the act of a stranger, the just and natural rule is that neither party shall be affected by the change. In *Pigot's Case*,<sup>3</sup> cited above, alterations by a stranger were said to have the same effect as if made by one of the parties. This case, however, grew out of an alteration in a deed, and the hard decision reached was the result of the technical rules of pleading then observed. In a suit upon a deed, the defendant's plea was *non est factum*, i.e.—“It is not my deed;” and as, in the case of any alteration, no matter by whom made, this plea, literally taken, would be true, it was held that judgment must necessarily be for the defendant upon such an issue. But in modern times it was thought unreasonable to subordinate the *ends* of the law, which are the administration of justice among men, to the mere *means* or *machinery* by which those ends are sought, such as the rules of pleading and of procedure. Hence, now, where neither party is at fault, neither will be injuriously affected by the alterations.<sup>4</sup>

If the alteration be immaterial, and made without fraudulent intent, the weight of authority unquestionably is that the contract remains unimpaired, whether the alteration be by the insertion or

<sup>1</sup> Bishop on Contracts, s. 748.

<sup>2</sup> *Pattinson v. Luckley*, L. R., 10 Ex., 330.

<sup>3</sup> 11 Coke, 27.

<sup>4</sup> *Henfree v. Bromley*, 6 East, 309; *U. S. v. Spalding*, 2 Mason, 478; *Goodfellow v. Inslee*, 1 Beasley, 355, and other citations in Greenl. Ev., s. 566.

the erasure of words;<sup>1</sup> though, even upon this point, modern authority in support of the contrary doctrine, that of Pigot's case, is not wholly wanting.<sup>2</sup> Changing the date of a promissory note and thus altering the time of payment, though to correct an error, and although the difference between the dates was only two days;<sup>3</sup> inserting negotiable words where there were none before;<sup>4</sup> appointing a particular place of payment;<sup>5</sup> increasing the rate of interest,<sup>6</sup> though not, perhaps, lessening it;<sup>7</sup> adding a seal,<sup>8</sup> or the words "& Co." to the name of one joint maker, even though there was no such firm,<sup>9</sup> have all been held material alterations, and therefore fatal, even in the case of negotiable paper in the hands of innocent purchasers.<sup>10</sup> Adding or taking away, after the signature of the maker or other party to commercial paper, words which are merely *descriptio personæ*, as "agent," "trustee," and the like, are immaterial, and of no effect;<sup>11</sup> but in States where such added words are treated as not merely *descriptio personæ*, but as making the note or bill that of the agent's alleged principal, the rule is otherwise.<sup>12</sup>

The effect of adding a new surety, maker, drawer, or the like,

<sup>1</sup> Aldous v. Cornwell, 9 Best & Sm., 617; s. c., 3 Law R., Q. B., 573; Humphreys v. Crane, 5 Cal., 173; Fuller v. Green, 64 Wis., 159; s. c., 54 Am. Rep., 600; Bishop on Contracts, s. 755 and citations; Milbery v. Storer, 75 Me., 69; s. c., 46 Am. Rep., 361; Arnold v. Jones, 2 R. I., 345.

<sup>2</sup> First National Bank v. Fricke, 75 Mo., 178; s. c., 42 Am. Rep., 397.

<sup>3</sup> Brown v. Straw, 6 Neb., 536; s. c., 29 Am. Rep., 369; see, also, Stevens v. Graham, 7 S. & R., 505; s. c., 10 Am. Dec., 485; Charlton v. Reed, 61 Iowa, 166; s. c., 47 Am. Rep., 808; Wood v. Steele, 6 Wall., 80.

<sup>4</sup> Bunce v. Wescott, 3 Barb., 374; Haines v. Bennett, 11 N. H., 181; Pepoor v. Stagg, 1 Nott & McC., 102; McCauley v. Gordon, 64 Ga., 221; s. c., 37 Am. Rep., 68.

<sup>5</sup> Nazro v. Fuller, 24 Wend., 374; Master v. Miller, Sm. Lead. Cas., 9th Am. ed., 1164; Townsend v. Star Wagon Co., 10 Neb., 615; s. c., 35 Am. Rep., 493; Cronkhite v. Nebeker, 81 Ind., 319; s. c., and note, 42 Am. Rep., 127.

<sup>6</sup> Lewis v. Shepherd, 1 Mackey, 46.

<sup>7</sup> Cambridge Bank v. Hyde 131, Mass., 77.

<sup>8</sup> Vaughan v. Fowler, 14 s. c., 355; 2 Dan. Neg. Inst., 1391.

<sup>9</sup> Haskell v. Champion, 30 Mo., 136.

<sup>10</sup> Wait v. Pomeroy, 20 Mich., 425; Benedict v. Cowden, 49 N. Y., 396; Palmer v. Largent, 5 Neb., 225; held *contra* where the alteration was erased before passing into the hands of innocent third party; Shepard v. Whetstone, 51 Iowa, 457, *sed quære*.

<sup>11</sup> Burlingame v. Brewster, 79 Ill., 515; Manufacturers' Bank v. Follett, 11 R. L., 92; Hayes v. Matthews, 63 Ind., 412.

<sup>12</sup> First National Bank v. Fricke, 75 Mo., 178; s. c., 42 Am. Rep., 397.

without the consent of prior parties to the contract in those relations, is a disputed question. According to some of the authorities, no man can be held to a contract which has been varied since his execution of it, without his consent, and it is wholly immaterial whether the variation is prejudicial to him, or for his benefit;<sup>1</sup> according to others, if the alteration benefits the sureties, and cannot prejudice them, they should not be released;<sup>2</sup> while others draw a distinction, repudiated by the Supreme Court of the United States,<sup>3</sup> between changes before, and changes after, the note or other instrument has reached the hands of the payee or obligee.<sup>4</sup> Adding the name of a witness, after execution, avoids a paper in States in which an attestation extends the period of limitation;<sup>5</sup> and the greater credence with the jury, or with the public, which an instrument apparently executed in the presence of a subscribing witness would probably carry with it, has been considered as of possible materiality.<sup>6</sup> Where attestation does not extend the period of limitation, and where mere production of the paper is, *prima facie*, proof of its execution, the addition is immaterial, and does not release any of the parties;<sup>7</sup> and so if the addition be made without any dishonest or fraudulent intent, the added name being that of a person who was present at the execution, though neither then nor afterwards, with the maker's privity, called upon to witness it.<sup>8</sup>

One claiming under an instrument, which has been in his possession, and which appears on its face to have been altered, is

<sup>1</sup> Nisbet v. Smith, 2 Bro. Ch. R., 579; Gardner v. Walsh, 5 E. & B., 83 (85 E. C. L.); Boulton v. Stubbs, 18 Ves., 20; Woodworth v. Bank of America, 19 Johns., 392; Nicholson v. Combs, 90 Ind., 515; s. c., 46 Am. Rep., 229; Wallace v. Jewell, 21 Ohio St., 163; s. c., 8 Am. Rep., 48; Hamilton v. Hooper, 46 Iowa, 515; s. c. 26 Am. Rep., 161; Haskell v. Champion, 30 Mo., 136; Smith v. U. S., 2 Wall., 235; McMicken v. Webb, 6 How., 298.

<sup>2</sup> Where, however, the question arose upon a reduction of interest by agreement between maker and holder without the surety's knowledge; Cambridge Savings Bank v. Hyde, 131 Mass., 77.

<sup>3</sup> Wood v. Steele, 6 Wall., 82.

<sup>4</sup> Ward v. Hackett, 30 Minn., 150; s. c., 44 Am. Rep., 187; and, even after negotiation, see McCaughey v. Smith, 27 N. Y., 39.

<sup>5</sup> Brackett v. Mountford, 11 Me., 115; Smith v. Dunham, 8 Pick., 246; see, also, Adams v. Frye, 3 Metc., 103; Marshall v. Gougler, 10 S. & R., 164.

Homer v. Wallis, 11 Mass., 312; Adams v. Fry, 3 Metc., 103.

<sup>7</sup> Fuller v. Green, 64 Wis., 159; s. c., 54 Am. Rep., 600.

<sup>8</sup> Milbery v. Storer, 75 Me., 69; Smith v. Dunham, 8 Pick., 246.

bound to explain the alteration.<sup>1</sup> Still, whether the alteration was made prior or subsequent to the execution is a question of fact, which must be submitted to the jury;<sup>2</sup> and, in modern times, the presumption, in the absence of any proof upon the subject, is that the alteration was before execution.<sup>3</sup>

Having now spoken of the promise, whether express or implied, which is necessary to a contract, and also of the consideration, whether express or implied, by which such promise is sustained, let us consider some important *objects* for which a contract may be made, and which seem to require a special mention. The object for which a contract is made may be either lawful or unlawful; and if it be unlawful the contract will be void, and the illegality may be pleaded as a defence to an action brought upon such a contract.<sup>4</sup> A distinction was formerly taken between contracts whose object was merely prohibited by the law under some given penalty, and those whose object was morally wrong. The former were termed *mala prohibita*, the latter *mala in se*;<sup>5</sup> and as to the former it was considered that, as they involved no moral turpitude, a man might embrace either of the alternatives offered by the law, that is, either abstain from the offence and remain harmless, or commit it and suffer the penalty. This distinction, however, has long been exploded;<sup>6</sup> for it is considered to be equally unfit that a man should be allowed to take advantage of what the law says he ought not to do, whether the thing be prohibited because it is against good morals, or whether it be prohibited because it is against the interest of the State. Whether, therefore, the object of a contract be unlawful because morally wrong, or unlawful by the policy of the common law, or unlawful because a penalty is attached to it by

<sup>1</sup> U. S. v. Linn, 1 How., 104; Smith v. U. S., 2 Wall., 232; 2 Pars. on Cont., 722.

<sup>2</sup> Little v. Herndon, 10 Wall., 31; Hunt v. Gray, 35 N. J. L., 227.

<sup>3</sup> Little v. Herndon, *supra*; Hanrick v. Patrick, 119 U. S., 172.

<sup>4</sup> Collins v. Blantern, 2 Wils., 341, 347: s. c., Smith's Leading Cases, 9th Am. ed., 646; Paxton v. Popham, 9 East, 408; Pole v. Harrobin, 9 East, 416, n.; DeBegnig v. Armistead, 10 Bing., 107 (25 E. C. L.); s. c., 3 M. & Sc., 516.

<sup>5</sup> See 1 Black. Com., 54, 57.

<sup>6</sup> Aubert v. Maze, 2 Bos. & Pul., 374, 375; Cannan v. Bryce, 3 B. & Ald., 183 (5 E. C. L.); Bensley v. Bignold, 5 B. & Ald., 335, 341 (7 E. C. L.); Cope v. Rowlands, 2 M. & W., 149, 157; Ferguson v. Norman, 5 Bing. N. C., 76, 84 (35 E. C. L.).

any particular statute, the contract in every such case is void ; and it is indifferent, under such circumstances, whether the contract be made by deed, or by parol merely. Thus, if a bond under seal be given by a man to a woman in order to induce her to cohabit with him, it is void for the immorality of its object.<sup>1</sup> But a bond given to a woman in respect of the injury she has sustained by past cohabitation is valid ;<sup>2</sup> for in this case the object is not immoral, and the consideration implied by the bond being a deed under seal supplies the want which would otherwise exist of a proper consideration.<sup>3</sup> If a contract have more than one object, and some of the objects are lawful whilst the others are unlawful, the unlawful objects will not vitiate the others,<sup>4</sup> provided the good part be separable from, and not dependent upon, that which is bad ;<sup>5</sup> unless of course the whole contract should be rendered void by any enactment to the effect that all instruments containing any matter contrary thereto shall be void, in which case everything connected with the instrument will be vitiated.<sup>6</sup> And if the good part of a contract be inseparable from the bad, as if a contract be made partly in consideration of the payment of money (which would be good), and partly for a consideration whose object is illegal, the illegal part of the consideration will vitiate the good, and render the whole contract void.<sup>7</sup>

<sup>1</sup> *Walker v. Perkins*, 1 Wm. Black., 517 ; s. c., 3 Barr., 1568 ; *Cray v. Mathias*, 5 Ves., 286.

<sup>2</sup> *Turner v. Vaughan*, 2 Wils., 339 ; *Hill v. Spencer*, 2 Amb., 641 ; *Gray v. Mathias*, 5 Ves., 286 ; *Hall v. Palmer*, 3 Hare, 532 ; *Knye v. Moore*, 1 Sim. & Stu., 61 ; s. c., 2 Sim. & Stu., 260 ; *Nye v. Moseley*, 6 B. & C., 133 (13 E. C. L.) ; s. c., 2 Sim., 161.

<sup>3</sup> *Binnington v. Wallis*, 4 B. & Ald., 650, 652 (6 E. C. L.) ; *ante*, p. 75.

<sup>4</sup> *Gaskell v. King*, 11 East, 165 ; *Wigg v. Shuttleworth*, 13 East, 87 ; *Howe v. Synge*, 15 East, 440 ; in all which decisions unlawful covenants to pay the property tax were held not to vitiate other valid covenants in the same instrument. See, also, *Kerrison v. Cole*, 8 East, 231 ; *Mallan v. May*, 11 M. & W., 653 ; *Green v. Price*, 13 M. & W., 695 ; affirmed 16 M. & W., 346 ; *Nicholls v. Stretton*, 10 Q. B., 346 (59 E. C. L.).

<sup>5</sup> See *Biddell v. Leeder*, 1 B. & C., 327 (8 E. C. L.), decided on the old Ship Registry Act.

<sup>6</sup> See *Collins v. Blantern*, Smith's Leading Cases, 9th Am. ed., 659, *et seq.*, 685, *et seq.*

<sup>7</sup> *Fetherstone v. Hutchinson*, Cro. Eliz., 199 ; *Bridge v. Cage*, Cro. Jac., 103. See, also, per Tindal, C. J., in *Waite v. Jones*, 1 Bing. N. C., 662 (27 E. C. L.) ; *Hopkins v. Prescott*, 4 C. B., 578 (56 E. C. L.)

The instance above given of a bond for future cohabitation is an example of a contract void on account of its object being *malum in se*, or morally wrong. In the same manner, no action can be maintained on any contract for the sale or publication of any libelous or immoral book or print.<sup>1</sup>

A striking instance of a contract, void on account of its object being contrary to the policy of the common law, occurs in the case of a contract in restraint of trade. It is for the advantage of the community that every person should be allowed the full exercise of his trade or profession; and any contract whereby a person is attempted to be restrained from following his usual calling, even for a limited time, is, therefore, absolutely void.<sup>2</sup> But a contract is not rendered void by having for its object the restraint of a person from trading in a particular place,<sup>3</sup> or within a reasonable distance from any particular place, for he may carry on his trade elsewhere; nor is a contract void which restrains a person from serving a particular class of customers<sup>4</sup> (for there are plenty of others to be found), or which binds a person to be the servant for life in his trade to another,<sup>5</sup> for this is not in restraint of trade when it is to be carried on for his life. In a recent case<sup>6</sup> a person agreed that he would become assistant to a dentist for four years, and that, after the expiration of that term, he would not carry on the business of a dentist in London, or any of the towns or places in England or Scotland, where the dentist might have been practicing before the expiration of the service.

<sup>1</sup> *Fores v. Johnes*, 4 Esp., 97; *Stockdale v. Onwhyn*, 5 B. & C., 173 (11 E. C. L.); s. c., 7 D. & R., 625; *Lawrence v. Smith*, Jac., 471.

<sup>2</sup> Year Book, P. 2 Hen. V., pl., 26; *Ward v. Byrne*, 5 M. & W., 548; *Hind v. Gray*, 1 M. & G., 195 (39 E. C. L.).

<sup>3</sup> *Hitchcock v. Coker*, 6 Ad. & E., 438 (33 E. C. L.); s. c., 1 N. & P., 796; *Archer v. Marsh*, 6 Ad. & E., 959 (33 E. C. L.); s. c., 2 N. & P., 562; *Leighton v. Wales*, 3 M. & W., 545.

<sup>4</sup> *Davis v. Mason*, 5 Term Rep., 118; *Proctor v. Sergeant*, 2 M. & G., 20 (40 E. C. L.); s. c., 2 Scott, N. R., 289; *Whittaker v. Howe*, 3 Beav., 383; *Pemberton v. Vaughan*, 10 Q. B., 87 (59 E. C. L.); *Atkins v. Kinnier*, 4 Ex. Rep., 776; *Elves v. Crofts*, 10 C. B., 241 (70 E. C. L.); *Avery v. Langford*, 1 Kay, 663, 667, where the cases are collected; *Harms v. Parsons*, 32 Beav., 328; *Brampton v. Beddoes*, 13 C. B. N. S., 538 (106 E. C. L.).

<sup>5</sup> *Rannie v. Irvine*, 7 M. & G., 969 (49 E. C. L.).

<sup>6</sup> *Wallis v. Day*, 2 M. & W., 273.

<sup>7</sup> *Mallan v. May*, 11 M. & W., 653. See also *Green v. Price*, 13 M. & W., 695, affirmed, 16 M. & W., 346; *Nicholls v. Stretton*, 10 Q. B., 346 (59 E. C. L.).



And it was held that the covenant not to practice in London was valid ; but that the stipulation as to the other towns and places in England or Scotland was void. And according to the rule above mentioned,<sup>1</sup> that where some of the objects of a contract are lawful and others unlawful, the unlawful objects will not vitiate the others, it was held that the stipulation as to practicing in London was not affected by the illegality of the remainder of the agreement.

The cases in which contracts may be void in consequence of their contravening some act of parliament are too numerous to be here specified. As an instance may be mentioned contracts by clergymen holding benefices with cure of souls, made for the purpose of charging such benefices with any sum of money ; which contracts are rendered void by a statute of Elizabeth.<sup>2</sup> And in these cases it has been held that any personal covenant for the payment of the money charged is not invalidated by being contained in the same deed as the attempted charge on the benefice. Securities for money won at play or any game, or by betting on any game, or for money lent for gaming or betting at the time and place of such play, were declared by a statute of Anne to be utterly void.<sup>4</sup> Contracts for the payment of money, whereby there should be reserved more than five per cent. interest, were, in like manner, declared void by a statute of Anne, called the Usury Law.<sup>5</sup>

As illustrative of contracts adjudged to be void as contrary to public policy or public morals, may be instanced contracts between persons not to bid against each other at public auctions ;<sup>6</sup> not to locate a depot within a given distance of the plaintiff's ;<sup>7</sup> agreements between heirs expectant, made in contemplation of marriage by one of them against the will of a parent, to divide the estate equally, without regard to the parent's will ;<sup>8</sup> mortgages or

<sup>1</sup> *Ante*, p. 132.

<sup>2</sup> Stat. 13 Eliz., c. 20. See *Shaw v. Pritchard*, 10 B. & C., 241 (21 E. C. L.) ; *Long v. Storie*, 3 DeG. & S., 308.

<sup>3</sup> *Monys v. Leake*, 8 Term Rep., 411 ; *Sloane v. Packman*, 11 M. & W., 770.

<sup>4</sup> Stat. 9 Anne, c. 14.

<sup>5</sup> Stat. 12 Anne, s. 2, c. 16.

<sup>6</sup> *Dudley v. Odom*, 5 S. C., 131. But parties may associate to purchase property at public sale : *Smith v. Ullman*, 58 Md., 183.

<sup>7</sup> *St. Joseph's, etc. R. R. Co. v. Ryan*, 11 Kansas, 602 ; s. c., 15 Am. Rep., 357 ; *Marsh v. Fairbury, etc. R. R. Co.*, 64 Ill., 414 ; s. c., 16 Am. Rep., 564 ; *St. Louis, etc. R. R. Co. v. Mathers*, 71 Ill., 592 ; s. c., 22 Am. Rep., 122.

<sup>8</sup> *Mercier v. Mercier*, 50 Ga., 546 ; s. c., 15 Am. Rep., 694.

other securities given in consideration of an agreement not to prosecute for a criminal offense;<sup>1</sup> an agreement to indemnify one against the consequences of publishing a libel;<sup>2</sup> contracts for future delivery of stocks, grain or other commodities where there is no intention of actual delivery, but merely of settling differences between the agreed and the market price;<sup>3</sup> policies of insurance, payable to persons having no interest in the life of the insured,<sup>4</sup> and the like.

The rule *ex turpi contractu actio non oritur*, is not wholly without qualification. Where money illegally earned is nevertheless paid into the hands of one as agent of him who earned it, to be paid over by such agent to his principal, the latter may maintain an action for the same against his agent.<sup>5</sup> In like manner, partners in an unlawful business, must, nevertheless, account with each other for the profits realized.<sup>6</sup> So, although money knowingly loaned to gamble with, or for the purpose of settling losses in furtherance of illegal stock-jobbing transactions, even though the lender was no party to the illegal acts, can not be recovered; yet money advanced for the payment of past gaming or stock-jobbing liabili-

<sup>1</sup> Peed v. McKee, 42 Iowa, 689; McMahon v. Smith, 47 Conn., 221; Bredin's Appeal, 92 Pa. St., 241; but see Bibb v. Hitchcock, 49 Ala., 468. The grantor cannot have the conveyance vacated; the law will aid neither party: Worcester v. Eaton, 11 Mass., 368.

<sup>2</sup> Atkins v. Johnson, 43 Vt., 78; s. c., 5 Am. Rep., 260.

<sup>3</sup> Grizewood v. Blane, 11 C. B., 526 (73 E. C. L.); Irwin v. Williar, 110 U. S. 499; Rumsey v. Berry, 65 Me., 574; Kirkpatrick v. Bensall, 72 Pa. St., 155; Gregory v. Wendell, 39 Mich., 337; s. c., 33 Am. Rep., 390; Everingham v. Meighan, 55 Wis., 354; Gregory v. Wattowa, 58 Iowa, 713; Hawley v. Bibb, 69 Ala., 52; Story v. Salomon, 71 N. Y., 420; Gregory v. Wendell, 40 Mich., 432; Sampson v. Shaw, 101 Mass., 145; Justh v. Holliday, 2 Mackey, 346. *In re John Green*, 7 Biss., 338; Clarke v. Foss, 7 *Ibid.*, 540; Whitesides v. Hunt, 97 Ind., 191; s. c., 49 Am. Rep., 441. In Pearce v. Foot, 113 Ill., 228, s. c., 55 Am. Rep., 414, money paid under such contracts is held to be recoverable as "winnings" under the gaming act; and in Cunningham v. National Bank, 71 Ga., 400, s. c., 51 Am. Rep., 266, promissory notes given for losses in such transactions are void as gambling securities, even in the hands of innocent purchasers.

<sup>4</sup> Cammack v. Lewis, 15 Wall., 643; Connecticut Mut. Life Ins. Co. v. Schaefer, 94 U. S., 457; same v. Luchs, 108 U. S., 498.

<sup>5</sup> Farmer v. Russell, 1 B. & P., 296.

<sup>6</sup> Poll. on Contracts, 244, 329; and see Armstrong v. Toler, 11 Wheat., 258; McBlair v. Gibbs, 58 U. S., 232; Railroad Co., v. Durant, 95 U. S., 578; Camp v. Welles, 11 Pa. St., 207.

ties, at the request of the debtor, may be.<sup>1</sup> By some of the authorities, both English and American, a distinction is drawn between cases in which there is merely knowledge on the part of one of the parties to a contract that the other contemplates an illegal act, as where the seller knows that the goods are to be used for an illegal purpose; and cases in which it is either a *part of the contract* that they shall be used for such purpose, or else the plaintiff does something in aid of the unlawful design, as where a vendor not only knew that the goods were to be smuggled, but packed them in a certain manner in aid of that purpose.<sup>2</sup> Other authorities ignore this distinction, and hold knowledge of the illegal purpose sufficient to defeat the action.<sup>3</sup>

Statutes imposing a penalty ordinarily render the penal act illegal, and defeat recovery for work done or goods sold in contravention of the statutes. To this principle, ordinarily, is to be referred the invalidity of contracts made on Sunday. So it has been held that there can be no recovery for threshing wheat with an apparatus for using which there was a penalty;<sup>4</sup> or for the price of fertilizers sold without being inspected, as required by a statute, imposing a penalty for disobedience.<sup>5</sup> An important distinction, according to the weight of authority, is to be observed between statutes designed for the protection of the public from fraud in contracts, or other objects of public policy; and statutes designed merely for the security and collection of the revenue, the former making all contracts in contravention of them void, the latter not so;<sup>6</sup> but the authorities cannot be wholly reconciled upon this distinction. Thus, in Virginia, contrary to this distinction, and to the authorities cited above, it is held that the price of fertilizers, sold

<sup>1</sup> *Wagh. v. Beck*, 114 Pa. St., 422; *McKinnell v. Robinson*, 3 M. & W., 434; *Falkney v. Reynons*, 4 Burr., 2069; *White v. Buss*, 3 Cush., 448; *Plummer v. Smith*, 5 N. H., 553; *Addison on Contracts*, 1159; *In re Third Nat'l Bank*, 10 Fed. R., 243; *Armstrong v. Toler*, *supra*, and citations.

<sup>2</sup> *Holman v. Johnson*, Cowp., 341; *Biggs v. Lawrence*, 3 T. R., 454; *Tracy v. Talmage*, 14 N. Y., 162, and citations; s. c., with note, 67 Am. Dec., 132.

<sup>3</sup> *Tracy v. Talmage*, 14 N. Y., 193, note; *Langton v. Hughes*, 1 M. & S., 593.

<sup>4</sup> *Dillon v. Allen*, 46 Iowa, 299; s. c., 26 Am. Rep., 145.

<sup>5</sup> *Woods v. Armstrong*, 54 Ala., 150; s. c., with note, 25 Am. Rep., 671; *McConnell v. Kitchens*, 20 S. C., 430; s. c., 47 Am. Rep., 845.

<sup>6</sup> *Benj. on Sales*, s. 818 *et seq.*, 4th Am. Ed.; *Harris v. Runnels*, 12 How., 83, 84.

without being inspected, as required by a penal statute, for the protection of purchasers, may nevertheless be recovered ;<sup>1</sup> while in Pennsylvania it is held that a real estate agent, subject to a statutory penalty for doing business without a license, cannot recover compensation for his services in that capacity.<sup>2</sup>

With regard to *mala prohibita*, there are exceptions to the rule that no actions will lie, growing out of contracts thus vitiated. Where the object of the prohibiting statutes is to prevent oppression, extortion or undue advantage over the necessities of men, it has been repeatedly held that, in the interest of public policy, which is the foundation of such statutes, actions may be sustained to recover moneys paid under contracts so prohibited, notwithstanding the fact that, in the violation of the statute, the plaintiff and the defendant were *in pari delicto*.<sup>3</sup> Where the statute imposes a penalty upon one of the parties to the transaction only, they are not *in pari delicto* ;<sup>4</sup> and, though a penalty be imposed upon both of the parties, it is still a question of construction, to be determined upon consideration of the entire statute, whether the contract is to be held void, or the penalties only are to be inflicted.<sup>5</sup>

Contracts whose objects are lawful are endlessly diversified and many of them are regulated by laws which it is not within the scope of the present work to enumerate. For the breach of any such contract pecuniary damages are, as we have seen,<sup>6</sup> the sovereign remedy prescribed by law, though equity not unfrequently administers more appropriate specifics. The person to whom money has become due, whether from any injury received, or from any contract broken, or from a contract to pay money itself, stands in a

<sup>1</sup> *Niemeyer v. Wright*, 75 Va., 239 ; s. c., 40 Am. Rep., 720. See, also, *Lyon v. Culberson*, 83 Ill., 33. *Niemeyer v. Wright*, however, turns somewhat upon the phraseology of the Virginia statute.

<sup>2</sup> *Johnson v. Hulings*, 103 Pa. St., 498 ; s. c., 49 Am. Rep., 131 ; *contra*, *Larned v. Andrews*, 106 Mass., 435 ; s. c., 8 Am. Rep., 346 ; *Aiken v. Blaisdell*, 41 Vt., 655 ; *Pangborn v. Westlake*, 36 Iowa, 547.

<sup>3</sup> *Jacques v. Golightly*, 2 W. Bl., 1073 ; *Browning v. Morris*, 2 Cowp., 790 ; *Williams v. Hedley*, 8 East., 378 ; *Lester v. Howard Bank*, 33 Md., 558 ; *Tracy v. Talmage*, 14 N. Y., 162 ; s. c., with note, 67 Am. Dec., 132 ; *Lowell v. Boston, etc. R. R. Co.*, 23 Pick., 24 ; *Story's Eq. Jur.*, 298-300.

<sup>4</sup> *Tracy v. Talmage*, *supra* ; *Browning v. Morris*, *supra* ; *Jacques v. Golightly*, *supra* ; *Jacques v. Withy*, 1 H. Bl., 65 ; *Williams v. Hedley*, *supra* ; *White v. Franklin Bank*, 22 Pick., 181 ; *Atlas Bank v. Nohant Bank*, 3 Metc., 581.

<sup>5</sup> *Harris v. Runnels*, 12 How., 80.

<sup>6</sup> *Ante*, p. 107.

situation more or less advantageous as regards his remedies for recovering the money, according to the nature of the *debt* which has thus become due to him. For, by the law of England, all creditors are not allowed equal rights, but are preferred the one to the other, partly according to accidental circumstances, and partly according to the degree of diligence and precaution which each may have used. The subject of debt is of sufficient importance to form a separate chapter.

## CHAPTER III.

### OF DEBTS.

DEBTS, by the law of England, are divided into different classes, conferring on the creditor different degrees of security for repayment. The class which confers the highest privileges is that of debts of record, which class will accordingly first claim our attention.

A debt of record is a debt due by the evidence of a court of record.<sup>1</sup> Every court, by having power given to it to fine and imprison, is thereby made a court of record.<sup>2</sup> Such courts are either supreme, superior or inferior. The supreme court is the Parliament. The superior courts of record are the House of Lords, the Court of Chancery, and the Courts of Queen's Bench, Common Pleas, and Exchequer, which are the more principal courts. The courts of the Counties Palatine of Lancaster and Durham are also superior courts of record.<sup>3</sup>

Debts of record do not, however, confer the same advantages on all creditors equally, for there is one creditor whose claims are paramount to all others, namely, the crown. In order to enjoy this priority, the crown debt was formerly required to be a debt of record, or a debt by specialty, that is, secured by deed;<sup>4</sup> though, if the debt were by simple contract without such security, it would have had preference over the other simple contract creditors of the debtor; and, as some say, even over other creditors by specialty.<sup>5</sup> The lien of the crown on the lands of its debtors by record or spe-

<sup>1</sup> 2 Black. Com., 465.

<sup>2</sup> Bac. Abr. tit. Courts (D) 2.

<sup>3</sup> *Ibid.*, (D) 1.

<sup>4</sup> Williams on Executors, pt. 3, bk. 2, ch. 2, s. 1.

<sup>5</sup> Bac. Abr. tit., Executors (L) 2.

The common law prerogative of the king, to be paid in preference to all other creditors, is not universally adopted in this country. It prevails in the government of the United States, and in Maryland, North Carolina, Indiana and Connecticut; it does not subsist in South Carolina: 1 Kent Com., 243 to 248, and notes. For the law of Pennsylvania on this subject, see Purd. Dig. (1861), 284; Ramsey's Ap., 4 Watts, 73; Arnold's Estate, 46 Penn. St., 277.—G. & W.

cialty, and also on the lands of accountants to the crown, is mentioned in the Principles of the Law of Real Property.<sup>1</sup>

Of all debts which one subject may owe to another, that which confers the most important remedy is a *judgment debt*, or a debt which is due by the *judgment* of a court of record. As such a debt is due by the evidence of a court of record, it is of course a debt of record. Such a debt may, however, now be incurred without any actual exercise of judgment on the part of the court. For, strange as it may appear, a judgment against a defendant in an adverse suit, though the most obvious, is yet not the most usual method of incurring a judgment debt. Such a debt may be incurred by the voluntary default of the defendant in making no reply to the action, which is called *nihil dicit*; or by his failing to instruct his attorney, whose statement of that circumstance is called *non sum informatus*; or by a *cognovit actionem*, or more shortly *cognovit*, by which the defendant confesses the action, and suffers judgment to be at once entered up against him.<sup>2</sup> Of late years, also, it has become very usual for the parties to a suit to obtain by consent a judge's order, authorizing the plaintiff to enter up judgment against the defendant, or to issue execution against him, either at once and unconditionally, or more usually at a future time, conditionally on the non-payment of whatever amount may be agreed on. A judgment obtained on a judge's order for immediate judgment and execution is, however, the same thing as a judgment by *nihil dicit*, or confession.<sup>3</sup> The method formerly the most frequent of incurring a judgment debt is not, however, attended with the actual commencement of any adverse action. A *warrant of attorney* is given by the intended debtor, which consists of an authority from him to certain attorneys to appear for him in court, and to receive a declaration in an action of debt for the amount of the intended judgment debt, at the suit of the intended creditor, and thereupon to confess the action, or suffer judgment to go by default, and to permit judgment to be forthwith entered up against the intended debtor for the amount, besides costs of suit. Such a warrant of attorney is generally executed as a security for a smaller

<sup>1</sup> Williams' Real Prop., 62, 1st ed.; 65, 2d ed.; 70, 3d & 4th eds.; 76, 5th ed.; 81, 6th ed.; 84, 7th ed.; 85, 8th ed.; 6th Am. ed., 52 and 70.

<sup>2</sup> 3 Black. Com., 397; Stephen on Pleading, 120.

<sup>3</sup> Bell v. Bidgood, 8 C. B., 763; Andrews v. Diggs, 4 Ex. Rep., 827.

sum of money, usually one-half of the amount of the judgment debt; and it is accordingly accompanied by a *defeasance*. This defeasance, as its name imports, defeats the full operation of the warrant of attorney, by declaring that it is given only as a security for the smaller sum and interest, and that no execution shall issue on the judgment to be entered up in pursuance of the warrant of attorney, until default shall have been made in payment of such sum and interest at the time agreed on; but that, in case of default, execution may be issued. The defeasance sometimes contains also an agreement that it shall not be necessary for the creditor to issue a writ of *scire facias*, or do any other act for reviving the judgment or keeping the same on foot, although no proceedings have been taken thereupon for the space of one year. Without such a provision, no execution can be issued, after the expiration of a twelve-month from the date of the judgment, without the expense and trouble of a writ of *scire facias*, calling on the debtor to inform the court, or show cause, why execution should not be issued.<sup>1</sup> A warrant of attorney is also sometimes given for entering up judgment for a sum of money, in order to secure the regular payment of an annuity; in which case the defeasance of course expresses that no execution shall be issued until default shall have been made for so many days in some payment of the annuity, but that, in case of such default, execution may be issued from time to time.<sup>2</sup>

A warrant of attorney need not be under seal,<sup>3</sup> though it generally is so.

In some of the United States, warrants of attorney to confess judgment before suit brought are prohibited by statute;<sup>4</sup> while in others they are held invalid under judicial construction.<sup>5</sup> Such warrants were, however, a familiar common law security;<sup>6</sup> but the authority to confess must be clear and explicit, and must be strictly pursued<sup>7</sup>—though the rule will not be applied so rigidly as to defeat the manifest intention of the parties.<sup>8</sup> The power to confess

<sup>1</sup> Stat. Westm. the second, 13 Edw. I., c. 45.

<sup>2</sup> See *Cuthbert v. Dobbin*, 1 C. B., 278 (50 E. C. L.).

<sup>3</sup> *Kinnersley v. Mussen*, 5 Taunt., 264 (1 E. C. L.).

<sup>4</sup> *O'Hara v. Lannier*, 1 B. Mon., 100; *Rankin v. Lawrence*, 4 Rich., Law, 267.

<sup>5</sup> *Hamilton v. Shoenberger*, 47 Iowa, 385.

<sup>6</sup> 1 Tidd's Prac., 9th London edition, c. 21, 545-56; *Ins. Co. v. Bailey*, 16 Gratt., 363; *Bush v. Hanson*, 70 Ill., 480.

<sup>7</sup> *Bank v. St. John*, 5 Hill, 497; *Frye v. Jones*, 78 Ill., 627.

<sup>8</sup> *Keith v. Kellogg*, 97 Ill., 147.



pertains to the remedy, and is governed by the *lex fori*; and, therefore, though valid in the State where made, it will not, for that reason, be valid in another State.<sup>1</sup> But a judgment confessed under such a power in any State, and valid there, is, under Section 1 of Article IV. of the Constitution of the United States, entitled to like faith and credit in every other State.<sup>2</sup>

The warrant to confess should contain a grant of authority clearly and intelligibly expressed, and a designation, either by name or description, of the person who is to execute it;<sup>3</sup> and it seems to have been thought, in some of the cases, that a power to a designated attorney of a particular court, *or to any other attorney of that or any other court*, to appear and confess, is void.<sup>4</sup> Such generality of designation does not appear, however, to be generally regarded as a defect.<sup>5</sup> In like manner, it has been held that a judgment by confession before maturity of the debt is void;<sup>6</sup> while, by other authorities, not only may such judgments be valid,<sup>7</sup> but judgments may be validly confessed to secure future advances of money,<sup>8</sup> and even as indemnity against future advances by way of accommodation promissory notes or other commercial paper.<sup>9</sup> But, in such cases, it is essential that the record of the lien should give all requisite information as to the extent and certainty of the contract, so that a junior creditor may, by inspection of the record, and by ordinary diligence and prudence, ascertain the extent of the encumbrance.<sup>10</sup> Whether the incorporation into a promissory note of a power to confess judgment renders it non-negotiable, is a disputed question, the later authorities being largely in the negative.<sup>11</sup> In the absence of statutory provision to the contrary, there would seem to be no legal necessity that the power to confess should be conferred by writing; and, in Pennsylvania, verbal

<sup>1</sup> Carlin v. Taylor, 7 Lea, 666.

<sup>2</sup> Randolph v. Kisler, 21 Mo., 557; Coleman v. Waters, 13 W. Va., 278.

<sup>3</sup> Rabe v. Heslip, 4 Pa. St., 139.

<sup>4</sup> See Livezey v. Pennock, 2 Browne, Pa., 321; Carlin v. Taylor, 7 Lea, 666.

<sup>5</sup> Croasdell v. Tallant, 83 Pa. St., 193; Keith v. Kellogg, 97 Ill., 147; and see Randolph v. Kisler, 21 Mo., 557.

<sup>6</sup> Baldwin v. Freyerdall, 10 Ill. App., 106.

<sup>7</sup> Black v. Pattison, 61 Miss., 599; Stern v. Mayes, 19 Mo. App., 511.

<sup>8</sup> Parmentier v. Gillespie, 9 Pa. St., 87; Truscott v. King, 6 N. Y., 147.

<sup>9</sup> Cook v. Whipple, 55 N. Y., 150; s. c., 14 Am. Rep. 202.

<sup>10</sup> Truscott v. King, *supra*.

<sup>11</sup> Dan. on Neg. Instr., s. 61.

authority has been adjudged sufficient.<sup>1</sup> And, at least in the absence of any showing of a meritorious defence, it will be presumed that the judgment by confession was rightfully entered, though no warrant appear in the record.<sup>2</sup>

At common law, judgments, like contracts, carried no interest; and, as the common law is presumed to exist in the several States composing the American Union, it has been held that interest cannot be allowed in a suit on a foreign judgment, in the absence of evidence showing that the common law has been altered in this respect in the State in which the judgment was rendered.<sup>3</sup> At the present time, however, interest has been made a statutory incident of judgments very generally in America, as well as in England; and the weight of authority would now seem to be that every judgment for the payment of money carries interest from its rendition,<sup>4</sup> even where the cause of action was a tort, and, therefore, did not itself bear interest.<sup>5</sup> And, in a suit upon a judgment, interest has been declared recoverable, as in other cases in which it was not contracted for, as damages for detention of the debt.<sup>6</sup> Whether, where payment has been suspended by legal proceedings, as by garnishment or attachment of the debt in the debtor's hands, the latter continues liable for interest, is a controverted question. According to some authorities, the garnishee, if there be no fraud, collusion or wilful delay, cannot be charged with interest;<sup>7</sup> while, according to others, interest continues, unless he kept the money idle, upon the three-fold ground that money is worth the interest, that the debtor, if he does not think so, may, at any time, relieve himself by paying the amount into court, and of public policy, to discourage debtors from procuring garnishment of money in their hands and protracting litigation to postpone the payment of it.<sup>8</sup>

<sup>1</sup> *Flanigan v. City*, 51 Pa. St., 491.      <sup>2</sup> *Gibboney v. Gibboney*, 2 Ill. App., 322.

<sup>3</sup> *Thompson v. Morrow*, 2 Cal., 99; s. c., 56 Am. Dec., 318.

<sup>4</sup> *Gwinn v. Whitaker*, 1 H. & J., 754; *Williams v. American Bank*, 4 Metc., 317, 322; *Mahurin v. Bickford*, 6 N. H., 567; *Igains v. Rice*, 17 Ala., 404; *Mayor of Macon v. Trustees*, 7 Ga., 204; *Grubb v. Brooke*, 47 Pa. St., 435.

<sup>5</sup> *Klock v. Robinson*, 22 Wend., 157, and citations; *Marshall v. Dudley*, 4 J. J. Marsh., 245; *Lord v. Mayor*, 3 Hill, N. Y., 427.

<sup>6</sup> *Harrington v. Glen*, 1 Hill, s. c., 79.

<sup>7</sup> *Hubbard v. Charlestown R. R.*, 11 Metc., 124, 128; *Prescott v. Parker*, 4 Mass., 170; *Jackson v. Lloyd*, 44 Pa. St., 82; *Rushton v. Rowe*, 64 *Ibid.*, 63.

<sup>8</sup> *Templeman v. Fauntleroy*, 3 Rand., 434; *Tazewell v. Barrett*, 4 H. & M.,

At common law, judgments against a decedent were entitled to priority of payment out of his personal estate over specialty or simple contract debts;<sup>1</sup> and, in the absence of statute, this priority still obtains.<sup>2</sup> The order of payment is now, however, generally regulated by statute in the several States.

The decree of a court of equity is equivalent to the judgment of a court of law.<sup>3</sup> And the privilege of priority of payment extends to the judgments of every court of record, whether superior or inferior; but the judgment of a foreign court is entitled to no precedence over a simple contract debt.<sup>4</sup> The remedies of the creditor by judgment of any of the superior courts, against the real estate of his debtor, are mentioned in the Principles of the Law of Real Property.<sup>5</sup> The remedies against the choses in possession of the debtor have been referred to in a previous part of the present work.<sup>6</sup> The remedies in respect of the choses in action of the debtor will be hereafter mentioned. In addition to these remedies, such judgment creditor might formerly have imprisoned the person of his debtor by means of the writ of *capias ad satisfaciendum*;<sup>7</sup> but, should he have done so, he would have relinquished all right and title to the benefit of any charge or security which he might have obtained by virtue of his judgment.<sup>8</sup>

In addition to judgment debts, the other debts of record are *recognizances* when duly enrolled,<sup>9</sup> and statutes merchant, statutes staple, and recognizances in the nature of statutes staple. The three last are now quite obsolete. A recognizance is an obligation entered into before some court of record or magistrate duly authorized, with condition to do some particular act, as to appear at the assizes, to keep the peace, or to pay a debt.<sup>10</sup> It is payable out of

259; *Hunter v. Spotswood*, 1 Wash., 145. And see *Mattingly v. Boyd*, 20 How., 128.

<sup>1</sup> 2 Bl. Com., 511; *Barrington v. Evans*, 3 Y. & C., 384.

<sup>2</sup> *Nimmo's Exr. v. Commonwealth*, 4 H. & M., 57; *Thompson v. Brown*, 4 Johns. Ch., 619.

<sup>3</sup> *Shafto v. Powel*, 3 Lev., 355.

<sup>4</sup> *Duplex v. DeProven*, 2 Vern., 540. See also *Smith v. Nicolls*, 5 Bing. N. C., 208 (35 E. C. L.).

<sup>5</sup> *Williams' Real Prop.*, 63 *et seq.*, 2d ed.; 66, 3d & 4th eds.; 71, 5th ed.; 75, 6th ed.; 78, 7th & 8th eds.; 6th Am. ed., 66 *et seq.*

<sup>6</sup> *Ante*, pp. 98-100.

<sup>7</sup> *Bac. Abr.*, tit., Execution (C) 3.

<sup>8</sup> *Bac. Abr.*, tit., Execution (D).

<sup>9</sup> *Glynn v. Thorpe*, 1 B. & Ald., 153.

<sup>10</sup> 2 Bla. Com., 341.

the personal estate of the debtor, in the event of his decease, next after judgment debts.<sup>1</sup>

It is a matter of some difficulty to state with accuracy what constitutes a "court of record." It is said above (p. 139) that every court, by having power given to it to fine and imprison, is thereby made a court of record; but every court of record does not possess this power.<sup>2</sup> The mere fact that a permanent record is kept is not sufficient, since probate and other courts of limited or special jurisdiction are required to keep records and yet are held not to be courts of record.<sup>3</sup> The definition of Bouvier<sup>4</sup> is, perhaps, the best, viz.: A judicial, organized tribunal, having attributes and exercising functions independently of the person of the magistrate designated generally to hold it, and proceeding according to the course of the common law.

Next in importance to debts of record were *specialty debts*, or debts secured by *special contract* contained in a *deed*.<sup>5</sup> These were of two kinds, debts by specialty in which the heirs of the debtor were bound, and debts by specialty in which the heirs were not bound. On the decease of the debtor, both these classes of specialty debts stood on a level so far as regarded their payment out of the personal estate of the debtor. They ranked next after debts of record, and took precedence of all debts by simple contract,<sup>6</sup> with the exception of money owing for arrears of rent, to which the feudal principles of our law have given an importance equal to that of debts secured by deed.<sup>7</sup> Debts by specialty in which the heirs were bound had, however, a precedence over those in which the heirs were not bound, in case the real estate of the debtor should

<sup>1</sup> Williams on Executors, pt. iii., bk. 2, s. 2.

In New Jersey and Tennessee, a recognizance creates a lien on the lands of the recognizor, from the time of its acknowledgment: *State v. Stout*, 6 Halst., 362; *State v. Winn*, 3 Sneed, 393; but, generally, a recognizance does not operate as a lien on the lands of the recognizors until judgment on the recognizance: *State v. Morgan*, 2 Bailey, 601; *Dewitt v. Osborn*, 5 Harring., 480; *People v. Lott*, 21 Barb., 130; *Gilmer v. Blackwell*, Dudley, 6; *Pinckard v. The People*, 1 Scam., 187; *Graham v. State*, 7 Blackf., 313; *Allen v. Reesor*, 16 S. & R., 11.—G. & W.

<sup>2</sup> *Inhabitants of Oldbery v. Stafford*, 1 Sid., 145; 3 Shars. Bl. Com., 25, n.

<sup>3</sup> Bouv. L. Dict., Title, "Court of Record."

<sup>4</sup> *Ibid.*

<sup>5</sup> 2 Bla. Com., 465. See *ante*, p. 115.

<sup>6</sup> *Pinchon's Case*, 9 Rep., 88 b.

<sup>7</sup> *Wentworth's Executors*, 284, 14th ed.; *Clough v. French*, 2 Coll., 277.

have been resorted to on his decease;<sup>1</sup> unless he should have charged his real estate by his will with the payment of his debts, in which case all the creditors of every kind would have been paid out of the produce of such real estate, without any preference.<sup>2</sup>

For the sake of the advantage of priority which might have been gained on the decease of the debtor, his heirs were usually bound in every specialty debt. The deed creating the debt was either a deed of *covenant* or a *bond*. A covenant ran thus: "And the said (*debtor*) doth hereby for himself, his *heirs*, executors and administrators, covenant with the said (*creditor*), his executors and administrators," to pay, etc. A bond was in the following form: "Know all men by these presents, that I (*debtor*), of (*such a place*), am held and firmly bound to (*creditor*), of (*such a place*), in the penal sum of 1000*l.* of lawful money of Great Britain, to be paid to the said (*creditor*), or to his certain attorney, executors, administrators or assigns, for which payment well and truly to be made I bind myself, my *heirs*, executors and administrators, and every of them, firmly by these presents. Sealed with my seal. Dated this 1st day of January, 1848." In both of the above cases it will be observed that the executors and administrators were bound as well as the heirs. This, however, was not absolutely necessary, and the covenant or bond would have been equally effectual if the heirs only had been named in it.<sup>3</sup>

A bond, in the form above mentioned, without any addition to it, was called a single bond. Bonds, however, had usually a condition annexed to them that, on the person bound (called the obligor) doing some specified act (as paying money when the bond was to secure the payment of money), the bond should be void. The condition of an ordinary money-bond was as follows: "The condition of the above-written bond or obligation is such that, if the above-bounden (*debtor*), his heirs, executors, or administrators, should pay unto the said (*creditor*), his executors, administrators or assigns, the full sum of 500*l.* (*usually half the amount named in the penalty*) of lawful money of Great Britain, with interest for the same after

<sup>1</sup> See Williams' Real Property, 60, 2d ed.; 63, 3d & 4th eds.; 68, 5th ed.; 72, 6th ed.; 77, 7th ed.; 78, 8th ed.; 6th Am. ed., 63; Richardson v. Jenkins, 1 Drew., 477, 483.

<sup>2</sup> 2 Jarm. Wills, 523, 2d ed.; 534, 3d ed.

<sup>3</sup> Co. Litt., 209 a; Barber v. Fox, 2 Wms. Saund., 136.

the rate of 5*l. per cent. per annum*, upon the — day of — now next ensuing, without any deduction or abatement whatsoever, then the above written bond or obligation shall be void, otherwise the same shall remain in full force." Bonds with conditions of this kind were long in use. In former times, when the condition was forfeited, the whole penalty was recoverable.<sup>1</sup> Equity subsequently interfered and prevented the creditor from enforcing more than the amount of the damage which he had actually sustained. The courts of law at length began to follow the example of the courts of equity; and, according to a course of proceeding of which there are many examples in the history of our law, the legislature more tardily adopted the rules which had already been acted on in the courts; and, by a statute of the reign of Queen Anne, it was provided that, in case of a bond with a condition to be void upon payment of a lesser sum, at a day or place certain, the payment of the lesser sum with interest and costs should be taken in full satisfaction of the bond, though such payment were not strictly in accordance with the condition.<sup>2</sup> But if the arrears of interest should have accumulated to such an amount as, together with the principal, to exceed the penalty of the bond, the creditor could claim no more than the penalty either at law<sup>3</sup> or in equity.<sup>4</sup> If, however, there were special circumstances in the creditor's favor, as if he had a mortgage also for the principal and interest,<sup>5</sup> or if the debtor had been delaying him by vexatious proceedings,<sup>6</sup> equity would then have aided him to the full extent of his demand.<sup>7</sup>

Bonds were frequently given, not only for securing the payment of money on a given day, but also with conditions to be void on the performance of many other acts agreed to be done, or on the payment of money by instalments. In such cases the law formerly was that, on the breach of any part of the condition, the whole penalty became due; and judgment and execution might be had thereon, subject only to the control of a court of equity on applica-

<sup>1</sup> Litt., s. 340.

<sup>2</sup> Stat. 4 & 5 Anne, c. 16, s. 12, 13. See *Bonafous v. Rybot*, 3 Burr., 1373; 2 Bla. Com., 341; *Smith v. Bond*, 10 Bing., 125 (25 E. C. L.); s. c., 3 M. & Sc., 528; *James v. Thomas*, 5 B. & Ad., 40 (27 E. C. L.).

<sup>3</sup> *Wild v. Clarkson*, 6 Term. Rep., 393.

<sup>4</sup> *Clarke v. Seton*, 6 Ves., 411; *Hughes v. Wynne*, 1 Myl. & K., 20.

<sup>5</sup> *Clarke v. Lord Abingdon*, 17 Ves., 106.

<sup>6</sup> *Grant v. Grant*, 3 Sim., 430.

<sup>7</sup> 6 Ves., 416.

tion to it for relief. But subsequently in such cases the obligee (or person to whom the bond is made) was required in bringing his action to state or *assign* the breaches which had been made by the obligor;<sup>1</sup> and, although judgment was still recovered for the whole penalty, execution of such judgment was allowed to issue only for the damages in respect of the breaches actually committed; and the judgment remained as a further security for the damages to be sustained by any future breach.<sup>2</sup>

The last and most numerous class of debts, though in the eye of the law the least important, are debts by simple contract, which are all debts not secured by the evidence of a court of record, or by deed or specialty. On the decease of the debtor, these debts were formerly payable out of his personal estate, by his executor or administrator, subsequently to all debts of record or by specialty, except voluntary bonds, which were payable after all simple contract debts, but before any of the legacies.<sup>3</sup>

Thus it will be seen that there were, according to the law of England, five principal kinds of debts, namely, crown debts, judgment debts, specialty debts in which the heirs were bound, specialty debts in which the heirs were not bound, and simple contract debts. Each of these classes had a law of its own, and remedies of varying degrees of efficacy. According to natural justice one would suppose that all creditors for valuable consideration should have an equal right to be paid; or, if any difference were allowed, that those who could least afford to lose should be preferred to the others. Our law, however, takes precisely the opposite course; and, for reasons which certainly illustrate the history of England, gives to the crown, representing the public in

<sup>1</sup> See the judgment of Parke, B., in *Grey v. Friar*, 15 Q. B., 891, 910 (69 E. C. L.); *Wheelhouse v. Ladbroke*, 3 H. & N., 291.

<sup>2</sup> Stat. 8 & 9 Will. III., c. 11, s. 8; *Hardy v. Bern*, 5 Term. Rep., 636; *Willinghby v. Swinton*, 6 East, 550; 1 Wms. Saund., 57, n. (1); *Hurst v. Jennings*, 5 B. & C., 650 (11 E. C. L.); s. c., 8 D. & R., 424.

<sup>3</sup> *Lomas v. Wright*, 2 Myl. & K., 769; *Watson v. Parker*, 6 Beav., 283.

A voluntary bond, in law as well as at equity, is good between the parties; but, in the course of administration, it must be postponed to any just debts, though due by simple contract: *Stephens v. Harris et al.*, 6 Ired. Eq., 57; *Pringle v. Pringle*, 69 Penn. St., 281; but, if given for the purpose of defrauding creditors, it is void: *Powell v. Inman*, 8 Jones L., 436. And see *Candor & Henderson's Ap.*, 27 Pa. St., 119; *Archer v. Hart*, 5 Florida, 234.

the aggregate, who can best afford to lose, a decided preference over private creditors, whose loss may be their ruin.<sup>1</sup> Again, a debt admitted without dispute gives the creditor far less advantage than a debt which has been contested and decreed to be paid by the judgment of a court of record. The proper function of a court of judicature would seem to be the settlement of disputes. In our law, however, the judgment of the court is permitted to be made use of, not only to settle contested claims, but also as a better security for money admitted to be due. The reason of this perversion of the proper end of a judgment has been the superior advantages possessed by a creditor having a judgment in his favor. So long, however, as the court exercises its legitimate function of deciding on contested claims, there seems to be no reason why a debt established by the decision of the court should have any preference over one which has never been disputed. If this were the case, the use of judgments as mere securities, by collusion or agreement of the parties, would at once fall to the ground; and an end would be put to a very fruitful source of litigation and fraud. Practically there are two reasons why payment of a debt is withheld, namely, either because the debtor, though able to pay, doubts his liability, or because he is unable to pay, though he knows he is liable. In the first case an action at law decides the question; but the judgment given by the court in exercise of its proper function is scarcely ever followed by the taking out of execution. The debt being established, the debtor pays it, and the judgment is immediately satisfied. The creditor has the advantage of the decision of the court, but he has no occasion for any of those extraordinary remedies to which his position as a judgment creditor entitles him. If, however, the debtor is unable to pay, judgment is obtained merely for the sake of its fruit. The creditor endeavors, by suing out an execution, to obtain an advantage over other creditors, who may not have put themselves and the debtor to the same trouble and expense. But inability to pay one debt is presumptive evidence of inability to pay others; and when a man is unable to pay all his creditors in full, it is time that a distribution should be made of his property amongst his creditors rateably. The extraordinary

<sup>1</sup> See *ante*, p. 139, *nota*.



privileges conferred on a judgment creditor seem, therefore, in most cases, practically to end in an undue preference of a pressing creditor over others who have as good a right to be paid. With respect to the three last classes of debts, namely, debts by specialty in which the heirs were bound, those in which the heirs were not bound, and simple contract debts, the distinctions between them serve principally to mark the steps of the struggle by which the rights of creditors have at length been obtained. The trophies of a victory so hardly won can scarcely be expected to present a very orderly appearance. The rights of these creditors accordingly varied with the accident of the death of the debtor, with the proportion which his real estate might have borne to his personality, and with the circumstance of his having or not having charged his real estate by his will with the payment of his debts; although, as we shall see, he could bring them all to a level by becoming a bankrupt if he pleased. It is surely time that the law of debtor and creditor should be placed upon some more simple and reasonable footing.

The next subject which claims our attention is that of interest upon debts. The absurd prejudice which anciently caused interest, under the name of usury, to be considered unlawful, retained some hold upon our law long after the taking of interest was rendered lawful by act of parliament.<sup>1</sup> In ordinary cases a debtor was allowed to withhold payment of his debt, without being obliged to give to his creditor the poor recompense of interest on the money he was making use of for his own benefit; for it was a general rule of law that interest was not payable on any debts, whether by specialty or simple contract, unless expressly agreed on, or unless a promise could be implied from the usage of trade or other circumstances, or unless the debt were secured by a bill of exchange or promissory note, which, being mercantile securities, always carried interest.<sup>2</sup> But in equity interest was more frequently allowed.<sup>3</sup>

The payment of a debt is sometimes secured by a *surety*, who makes himself liable, together with the principal debtor, for the payment. If the surety should pay the debt, he will become the

<sup>1</sup> Stat. 37 Hen. VIII., c. 9. See *ante*, p. 10.

<sup>2</sup> *Higgins v. Sargent*, 2 B. & C., 348 (9 E. C. L.); s. c., 3 D. & R., 613; *Foster v. Weston*, 6 Bing., 709 (19 E. C. L.); *Page v. Newman*, 9 B. & C., 378 (17 E. C. L.).

<sup>3</sup> See *Lowndes v. Collins*, 17 Ves. 27; 2 Fonb. Eq., 429; C. P. Cooper, 426, *et seq.*

creditor of the principal debtor for the amount; but, although the debt paid should have been secured to the original creditor by the bond under seal of the debtor and his surety, the surety, having paid the debt, becomes the simple contract creditor only of the principal debtor; unless he have taken the precaution to procure from such debtor a counter-bond for his own indemnity.<sup>1</sup> The surety, however, is entitled to the benefit of all collateral securities which the creditor, whom he has repaid, held for the debt; but he is not to be entitled to the original bond executed by the debtor, because that is at an end by the very fact of the payment.<sup>2</sup> In the words of Lord Brougham,<sup>3</sup> the court admitted the surety's right, as against the principal debtor, to stand in the shoes of the creditor; but said there were no shoes for him to stand in.

In the United States, however, by statutes in some of the States and without them in others, the debt is very generally treated as not having been extinguished by the payment, but as still subsisting for the benefit of the surety, who may have the bond, judgment or other evidence of debt assigned to him; or be allowed, without that formality, to stand in the same legal position with regard to it as if it were so assigned.<sup>4</sup>

If there should have been more than one surety, any one surety, paying the whole debt, is entitled, according to the principles of justice, to contribution from his co-sureties in equal shares; or, if they should have been sureties to unequal amounts, then in proportion to the respective amounts to which they have made themselves liable.<sup>5</sup> In equity, if any surety has become insolvent, the others must contribute rateably to the payment of the

<sup>1</sup> *Copis v. Middleton, Turn. & Russ.*, 224.

<sup>2</sup> *Copis v. Middleton, Turn. & Russ.*, 231; *Dowbiggen v. Bourne*, 2 You. & Col., 462; *Jones v. Davids*, 4 Russ., 277; *Caulfield v. Maguire*, 2 Jones & Lat., 164, 168.

<sup>3</sup> *Hodgson v. Shaw*, 3 Myl. & K., 183, 194.

<sup>4</sup> *Harris v. Carlisle*, 12 Ohio, 169; *Cuyler v. Ensworth*, 6 Page, 32; *Grove v. Bien*, 1 Md., 439; *Norton v. Soule*, 2 Me., 341; *Robinson v. Sherman*, 2 Gratt., 181; *Fawcetts v. Kinney*, 33 Ala., 261; *Furnold v. Bank*, 44 Mo., 336; *Edgerly v. Emerson*, 3 Fost. (23 N. H.), 555; s. c., 55 Am. Dec., 207; *Richter v. Cummings*, 60 Pa. St., 441; *Brandt on Suretyship*, s. 264, 270, 271, 273, 274. But see *Hull v. Sherwood*, 59 Mo., 172; *Sanders v. Watson*, 14 Ala., 198; *Miller v. Porter*, 5 Humph., 294; *Brandt on Suretyship*, s. 272, 273.

<sup>5</sup> *Deering v. Earl of Winchelsea*, 2 Bos. & Pul., 270, 272, 273; *Brown v. Lee*, 6 B. & C., 689 (13 E. C. L.); s. c., 9 D. & R., 701.

whole debt.<sup>1</sup> But, if the surety has paid no more than his own proportion of the debt, he cannot obtain contribution from any of the others;<sup>2</sup> nor will contribution be allowed when the suretyship of one person is a distinct transaction from that of the others.<sup>3</sup> A surety, however, may be discharged from his liability by the conduct of the creditor. As surety he has made himself liable only for the payment of a particular debt at a given time, or under certain given circumstances. If therefore the creditor, by any subsequent arrangement with the principal debtor, preclude himself from demanding payment of his debt at the time or under the circumstances originally agreed on, the surety will be at once discharged from all liability.<sup>4</sup> Thus, if the creditor bind himself to give further time for payment to the principal debtor,<sup>5</sup> or compound with him, without expressly reserving his remedy against the surety,<sup>6</sup> the surety will be discharged. But the acceptance by the creditor from the principal debtor of a new and independent security for the debt will not discharge the surety.<sup>7</sup> Neither will the surety be discharged by the mere neglect of the creditor to enforce payment of the debt from the principal debtor at the time of its becoming due;<sup>8</sup> nor by the creditor's express agreement to give time to the principal debtor, if such agreement fail in any of the requisites of a binding contract.<sup>9</sup>

<sup>1</sup> *Peter v. Rich.*, 1 Ch. Rep., 34; *Hitchman v. Stewart*, 3 Drew., 271.

<sup>2</sup> *Ex parte Gifford*, 6 Ves., 807; *Davis v. Humphreys*, 6 M. & W., 153, 168, 169.

<sup>3</sup> *Coope v. Twyman*, T. & Russ., 426; *Craythorne v. Swinburne*, 14 Ves., 160; *Pendlebury v. Walker*, 4 You. & Col., 424.

<sup>4</sup> *Calvert v. London Dock Company*, 2 Keen, 638; *Heath v. Key*, 1 You. & Jer., 434; *Nicholson v. Revill*, 4 Ad. & E., 675, 683 (31 E. C. L.); *Blake v. White*, 1 You. & Col., 420; *Bowser v. Cox*, 4 Beav., 879; 6 Beav., 110; and see *Squire v. Whitton*, 1 H. of L. C., 333.

<sup>5</sup> *Samuel v. Howarth*, 3 Meriv., 272; *Eyre v. Bartrop*, 3 Madd., 221; *Moss v. Hall*, 5 Ex. Rep., 46; *Davis v. Stainbank*, 6 De Gex, M. & G., 679; *Bailey v. Edwards*, 4 B. & S., 761 (116 E. C. L.).

<sup>6</sup> *Ex parte Gifford*, 6 Ves., 807; *Ex parte Carstairs*, Buck, 560; *Maltby v. Carstairs*, 7 B. & C., 737 (14 E. C. L.); s. c., 1 M. & R., 549; *Thompson v. Lack*, 3 C. B., 540 (54 E. C. L.); *Owen v. Homan*, 4 H. of L., Cases, 997; *Close v. Close*, 4 De Gex, M. & G., 176; *Webb v. Hewitt*, 3 Kay & John., 433; *Boaler v. Mayor*, 19 C. B., N. S., 76 (115 E. C. L.).

<sup>7</sup> *Bell v. Banks*, 3 M. & G., 258 (42 E. C. L.).

<sup>8</sup> *Eyre v. Everett*, 2 Russ., 381; *Peel v. Tatlock*, 1 B. & P., 419.

<sup>9</sup> *Philpot v. Briant*, 4 Bing., 717 (13 E. C. L.); *Tucker v. Laing*, 2 Kay & John., 745.

Though the terms surety and guarantor are frequently used indiscriminately, they are by no means synonymous. The contract of the former is usually entered into simultaneously with that of his principal, constituting him an original debtor from the beginning, not entitled to notice of his principal's default, and liable to be sued jointly with him; while the contract of guaranty is distinct from that of the principal contract, resting frequently upon a separate consideration, and is usually either precedent or subsequent in point of time, ordinarily requiring notice of the principal's default in order to charge the guarantor, and, in general, not admitting of joinder in a single action.<sup>1</sup> As a consequence of the fact that a guaranty is a distinct transaction from the principal contract, it follows that an offer or proposal of guaranty does not bind the guarantor, unless he be duly notified of its acceptance; merely acting upon it is insufficient;<sup>2</sup> though, if made at the request of the guarantee, it is itself the answer, and completes the contract.<sup>3</sup> And where the guaranty is not in the form of a proposal, but purports to be made upon a consideration expressed in it, as in consideration of one dollar paid and received, it is binding without notice of acceptance.<sup>4</sup> And, though notice be necessary, it need not be express, but may be inferred from circumstances.<sup>5</sup>

Where, in addition to the guaranty, the creditor holds other security, as a mortgage, pledge, or the like, he is not compelled to resort to the latter before proceeding against the surety or guarantor;<sup>6</sup> nor, generally, is he bound to sue the principal before proceeding against the surety.<sup>7</sup> In some of the American States, it seems to be held that a guarantor, as contra-distinguished from a surety, is not liable until the creditor has exhausted his remedies against the principal, unless the utter insolvency of the latter can be shown.<sup>8</sup>

<sup>1</sup> Brandt on Suretyship, s. 1.

<sup>2</sup> Douglass v. Reynolds, 7 Pet., 113; Adams v. Jones, 12 Pet., 207; Davis Sewing Machine Co. v. Richards, 115 U. S., 524; Barndt on Suretyship, s. 157 *et seq.*

<sup>3</sup> Davis v. Wells, 104 U. S., 159.

<sup>4</sup> *Ibid.*; Lawrence v. McCalmont, 2 How., 426.

<sup>5</sup> Reynolds v. Douglass, 12 Pet., 497.

<sup>6</sup> Ranelaughs v. Hayes, 1 Vern., 189; Buck v. Sanders, 1 Dana, 187; Hayes v. Ward, 4 Johns., Ch., 123; Day v. Elmore, 4 Wis., 214.

<sup>7</sup> Abercrombie v. Knox, 728; s. c., 37 Am. Dec., 721.

<sup>8</sup> Reynolds v. Edney, 8 Jones, N. C., 406.

But, while it is impossible to lay down any rule upon which all the decisions upon this subject can be reconciled, the true principle doubtless is that guarantors and sureties are alike liable upon their undertakings immediately upon default; and the real question, in every case, is perhaps one of construction, to ascertain when, under the terms of the particular contract, the surety or guarantor is in default. Thus, where the guaranty is for the *payment* of a debt,<sup>1</sup> or that a debt shall prove *collectible*,<sup>2</sup> some courts have construed the engagement to be that the guarantor will pay, if payment or collection fails after due diligence has been exercised to secure the same; while, in others, the construction is less favorable, and the guarantor is held liable immediately upon the principal's default.<sup>3</sup>

Where the guaranty is for the payment of money at or within a given time, as, also, in case of the guaranty of a promissory note, or other instrument which is payable at a fixed date, the guarantor is suable immediately upon the expiration of the time prescribed, without payment.<sup>4</sup>

Although the surety may not at law, before he has paid the debt, sue either his principal for indemnity or his co-surety for contribution, he may, nevertheless, in equity, maintain a bill for exoneration, or contribution, without having himself paid anything; and may even compel the creditor to proceed against the principal, provided he will indemnify the latter against the costs in case the proceeding should prove fruitless.<sup>5</sup> Whether he can discharge himself by requesting the creditor to proceed against a solvent principal, if the creditor neglects and the principal becomes insolvent, is a controverted question. In several of the United States by judicial decisions, and in others by statute, he will stand discharged under such circumstances;<sup>6</sup> nor need the request be ac-

<sup>1</sup> *Rudy v. Wolfe*, 16 S. & R., 79; *Benton v. Gibson*, 1 Hill, s. c., 56; *Farrow v. Respass*, 11 Ired., L., 170.

<sup>2</sup> *Dana v. Conant*, 30 Vt., 246; *Aldrich v. Chubb*, 35 Mich., 350.

<sup>3</sup> *Heaton v. Hulbert*, 3 Scam., 489; *Wren v. Pearce*, 4 Smedes & Marsh., 91; see *Memphis v. Brown*, 20 Wall., 289, 310-11; *Brandt on Suretyship*, s. 82, *et seq.*

<sup>4</sup> *Brandt*, s. 86, and citations.

<sup>5</sup> *Brandt on Suretyship*, s. 192, 193, 205, 239.

<sup>6</sup> *King v. Baldwin*, 17 Johns., 384; s. c., 2 Amer. Lead. Cas., 5th ed., 372, and note; *Church v. Simmons*, 83 N. Y., 264; *Toler v. Adey*, 84 N. Y., 239; *Cope v. Smith*, 8 S. & R., 110; *Conrad v. Foy*, 68 Pa. St., 381; *Hunt v. Purdy*, 82 N. Y., 490; *Hopkins v. Spunlock*, 2 Heisk., 152; *Bruce v. Edwards*, 1 Stew., 11.

accompanied by an offer to pay the expenses of the suit, unless the creditor's refusal is expressly based upon his unwillingness to incur costs.<sup>1</sup> The more numerous authorities, however, are opposed to this view, holding, in effect, that the surety's contract is to pay, not in case the principal cannot be made to pay, but if he does not do so; that one object in requiring a surety may be, and frequently is, to secure prompt payment, without litigation; and that, if the surety desires suit brought against the principal, he may pay the debt and himself bring the suit.<sup>2</sup>

We now approach the subject of the alienation of debts, to which some reference has already been made. We have seen that a debt was anciently considered as a mere right to bring an action against the debtor; and as such was incapable of being transferred.<sup>3</sup> In process of time, however, an assignment of a debt was permitted to take place by means of an authority from the creditor to his assignee to sue the debtor in the creditor's name. This authority is usually called a *power of attorney*, which need not be by deed, but may be by writing unsealed,<sup>4</sup> or even by parol;<sup>5</sup> and when a debt is a *legal* debt, recoverable only in a court of law, it cannot be effectually assigned without such a power. The assignment of debts by means of powers of attorney is now recognized and protected by the courts of law. Thus, in a case where the original creditor became bankrupt after he had assigned his debt, it was held that an action against the debtor might still be properly brought in the name of such original creditor, by virtue of the power of attorney which he had given to his assignee; although, if no assignment had been made, the assignees of the creditor under the bankruptcy would have been the proper parties to sue.<sup>6</sup> So, if a power of attorney be given on an assignment of a debt for a valuable consideration, it is held to be irrevocable by the assignor.<sup>7</sup> When a debt or demand is *equitable* only, that is, of a nature to be recoverable only in the Court of Chancery, it may be assigned without a power

<sup>1</sup> Brandt on Suretyship, s. 206.

<sup>2</sup> For the authorities, *pro* and *con*, see Brandt, s. 206, *et seq.*

<sup>3</sup> *Ante*, p. 8.

<sup>4</sup> *Howell v. M'Ivers*, 4 Term Rep., 690.

<sup>5</sup> *Heath v. Hall*, 4 Taunt., 326.

<sup>6</sup> *Winch v. Keeley*, 1 Term Rep., 619; *Parnham v. Hirst*, 8 M. & W., 743. See *De Ponthonier v. De Mattos*, 1 E. B. & E., 461 (96 E. C. L.).

<sup>7</sup> *Walsh v. Whitcomb*, 2 Esp., 565.

of attorney; for equity will allow the assignee to sue in his own name. When a debt is assigned, the title of the assignee is not complete until he has given to the debtor notice of the assignment;<sup>1</sup> for the debtor, if he has had no notice of the assignment, may lawfully pay his debt to the original creditor, and will be effectually discharged by his receipt.

Bills of exchange and promissory notes are, as we have already seen,<sup>2</sup> exceptions to the rule which requires a power of attorney to enable the assignee to sue the debtor for the debt assigned. The custom of merchants was, in ancient times, sufficiently powerful to countervail in this respect the strictness of the common law, and the holder of a bill of exchange was able to sue upon it in his own name. By a statute of Anne,<sup>3</sup> promissory notes were made assignable or indorsable over in the same manner as inland bills of exchange might be according to the custom of merchants.

Debts, being considered at common law as mere rights of action, could not be taken in execution on a judgment obtained against the creditor. In many of the United States, however, as also in England, statutory provisions have now extended the remedies of creditors so as to subject the debtor's choses in action to satisfaction of the creditor's claim by attachment in the nature of an execution; but the provisions in the several States differ in so many particulars as to preclude more than a passing reference, inviting further inquiry, in a work like the present.

We have now to consider the payment of debts. And, in the first place, the payment of a smaller sum is no satisfaction of a larger one, unless there be some consideration for the relinquishment of the residue,<sup>4</sup> such as the payment at an earlier time than the whole is due,<sup>5</sup> or the concurrence of some<sup>6</sup> or all of the other creditors of the debtor in accepting a composition.<sup>7</sup> But it seems that the acceptance of a *negotiable security* for a small amount may be a good satisfaction for a larger debt;<sup>8</sup> and the payment of a small

<sup>1</sup> See *post*, the chapter on Title.

<sup>2</sup> *Ante*, p. 8, 10.

<sup>3</sup> Stat. 3 & 4 Anne, c. 9, made perpetual by stat. 7 Anne, c. 25.

<sup>4</sup> *Cumber v. Wane*, 1 Strange, 425; s. c., Smith's Leading Cases, 9th Am. ed., 606; *Fitch v. Sutton*, 5 East., 230.

<sup>5</sup> Co. Litt., 212 b.

<sup>6</sup> *Norman v. Thompson*, 4 Ex. Rep., 755.

<sup>7</sup> *Reay v. Richardson*, 2 C., M. & R., 422; *Pfleger v. Browne*, 28 Beav., 391.

<sup>8</sup> *Sibree v. Tripp*, 15 M. & W., 23.

sum may be a good satisfaction for an unliquidated demand for large pecuniary damages, on account of the uncertainty of such a claim.<sup>1</sup> When a less sum is paid to the creditor than the whole amount of his demands, it is competent to the debtor to make the payment in satisfaction of any demand he may please, and the creditor must appropriate the payment accordingly;<sup>2</sup> but, if the payment be made generally, without any express appropriation, the creditor may elect at the time of payment,<sup>3</sup> or within a reasonable time after,<sup>4</sup> to appropriate the money to whichever demand he may please. And, if no election as to the appropriation of the payment should be made on either side, the law, in ordinary cases of current accounts, will presume that the first item on the debit side is discharged or reduced by the first payment entered on the credit side, and so on in the order of time.<sup>5</sup> When the debt carries interest, the payment is considered to be applied in the first place in discharge of the interest then due; and the surplus, if any, in discharge *pro tanto* of the principal. For no creditor would apply any payment to the discharge of part of the principal, which carries interest, instead of to the discharge of interest, for which, when due, no further interest is payable.<sup>6</sup>

The creditor, however, if he accepts the payment, is bound to apply it in accordance with the debtor's directions, even though the direction be to apply to payment of the principal, to the exclusion of the interest, where both principal and interest are due;<sup>7</sup> or to payment of a debt not matured rather than to one already due.<sup>8</sup> The direction,<sup>9</sup> as well as the application,<sup>10</sup> may be shown by acts or

<sup>1</sup> *Wilkinson v. Byers*, 1 Ad. & E., 106 (28 E. C. L.).

<sup>2</sup> *Shaw v. Picton*, 4 B. & C., 715 (10 E. C. L.); *Nash v. Hodgson, Ltd. C. & Lda. Justices*, 1 Jur. N.S., 946; s. c., 6 De Gex, M. & G., 474.

<sup>3</sup> *Devaynes v. Noble*, 1 Meriv., 604.

<sup>4</sup> *Simson v. Ingham*, 2 B. & C., 65 (9 E. C. L.).

<sup>5</sup> *Devaynes v. Noble*, 1 Meriv., 608; *Williams v. Rawlinson*, 10 J. B. Moore, 362; *Merriman v. Ward*, 1 John. & H., 371.

<sup>6</sup> *Bower v. Marris*, 1 Cr. & Phi., 351, 355.

<sup>7</sup> *Prindall v. Bank*, 10 Leigh, 484.

<sup>8</sup> *Wetherell v. Joy*, 40 Me., 325; *Smuller v. Union Canal Co.*, 37 Pa. St., 68.

<sup>9</sup> *Tayloe v. Sandiford*, 7 Wheat., 14; *Terhume v. Colton*, 12 N. J., Eq., 233, 312.

<sup>10</sup> *Howland v. Rench*, 7 Blackf., 236; *Mitchell v. Dall*, 2 H. & G., 159; *West Branch Bank v. Moorehead*, 5 W. & S., 542; *Lanten v. Rowan*, 59 N. H., 215; *Roakes v. Bailey*, 55 Vt., 542.



circumstances ; and though the payment be through the instrumentality of a written instrument, as a promissory note, the direction as to its application may be shown by parol.<sup>1</sup> The debtor's right to direct the application applies only to voluntary payments, and not to those made by process of law ;<sup>2</sup> nor, on the other hand, does the creditor's right of direction extend to moneys coming involuntarily into his hands, as, for example, to apply the surplus proceeds of one mortgage to a debt secured by another.<sup>3</sup> An agent collecting money for his principal may not apply it to a debt due to himself from the principal, without the latter's consent ;<sup>4</sup> nor can a factor so apply the proceeds of a consignment made to him, accompanied by special directions as to their disposition.<sup>5</sup> So, where money is in the hands of the debtor's agent, with instructions to be paid upon two notes, one secured and the other not so, the creditor, knowing the facts, cannot secure the entire amount for the latter by bringing suit upon it and attaching the fund in the agent's hands.<sup>6</sup>

Where the debtor directs no application of the payment, it becomes the creditor's privilege, under certain limitations, to appropriate it as he pleases. Logically, the Statute of Limitations, which merely renders debts non-actionable after a prescribed period, without extinguishing them, would not preclude the creditor from applying an unappropriated payment to a barred debt ; and numerous authorities, English and American, recognize his right to do so ;<sup>7</sup> and, in like manner, it has been held that the creditor may apply the payment to a debt not actionable under the Statute of Frauds, as an oral promise to answer for the debt of another.<sup>8</sup> But the application by the creditor to a barred debt will not revive the residue thereof, as a voluntary payment by the debtor on account would do.<sup>9</sup> Subject to this privilege of appropriating to debts barred by limitation, or otherwise non-actionable merely, the creditor's right is limited to legal, valid claims, payment of which can

<sup>1</sup> *Ilsley v. Jewett*, 2 Metc., 168.

<sup>2</sup> *Blackstone Bank v. Hill*, 10 Pick., 129.

<sup>3</sup> *Mahone v. Williams*, 39 Ala., 202.

<sup>4</sup> *Morse v. Woods*, 5 N. H., 297.

<sup>5</sup> *Farmers' Bank v. Franklin*, 1 La. Ann., 393.

<sup>6</sup> *Jones v. Perkins*, 29 Miss., 139 ; s. c., with note, 64 Am. Dec., 136.

<sup>7</sup> *Byles on Bills*, 356 and citations ; *Armistead v. Brooke*, 18 Ark., 521 ; but see *Livermore v. Rand*, 26 N. H., 85.

<sup>8</sup> *Haynes v. Nice*, 100 Mass., 327 ; and see *Crookshanks v. Rose*, 1 M. & R., 100 ; s. c., 5 C. & P. (24 E. C. L.), 19.

<sup>9</sup> *Byles*, 356 ; *Pond v. Williams*, 1 Gray, 630 ; *Armistead v. Brooke*, *supra*.

be enforced.<sup>1</sup> Thus, although payment by a debtor, in the absence of statutory provision to the contrary, is irrevocable,<sup>2</sup> a creditor cannot apply an unappropriated payment to a usurious in preference to a lawful claim;<sup>3</sup> nor to a debt subsequently arising,<sup>4</sup> or not matured,<sup>5</sup> in preference to one already due. Where he is both creditor and agent for another creditor,<sup>6</sup> or where he holds a debt due to himself and a debt due to himself and another,<sup>7</sup> he must apply ratably unappropriated payments received from the debtor. So, where several promissory notes, some of which had sureties, and the others none, had been reduced to judgment in the same suit, it was held that the sureties were entitled to a *pro rata* application of moneys realized under the judgment;<sup>8</sup> though it has also been held that the mere fact that there is a surety does not preclude the creditor from applying a payment to a debt without surety,<sup>9</sup> nor will equities between the debtor and the surety, of which the creditor had no notice, as, for example, even the fact that the payment was made with money procured through the surety's indorsement for the express purpose of paying the secured debt, have that effect.<sup>10</sup> Payments by an individual cannot be applied to debts of a firm of which he is a member, instead of to his individual debt, without his consent;<sup>11</sup> and, if he be the successor of his firm, a creditor with whom he continues to deal may appropriate his payments to his later individual debt, rather than to those of the partnership;<sup>12</sup> though, if he be surviving partner, continuing the business, the application must be to the earlier items.<sup>13</sup>

<sup>1</sup> *Bancroft v. Dumas*, 21 Vt., 465.

<sup>2</sup> *Caldwell v. Wentworth*, 14 N. H., 431; *Hubbell v. Flint*, 15 Gray, 550.

<sup>3</sup> *Rohan v. Hanson*, 11 Cush., 44; *Greene v. Tyler*, 33 Pa. St., 361.

<sup>4</sup> *Law v. Sutherland*, 5 Grat., 357.

<sup>5</sup> *Heintz v. Cohn*, 29 Ill., 308; *Bobe v. Stickney*, 36 Ala., 482; *Bacon v. Brown*,

1 Bibb, 334; s. c., 4 Am. Dec., 640; *Cloney v. Richardson*, 34 Mo., 370.

<sup>6</sup> *Cole v. Trull*, 9 Pick., 325; *Ely v. Bush*, 89 N. C., 358.

<sup>7</sup> *Colby v. Copp*, 35 N. H., 434.

<sup>8</sup> *Blackstone v. Hill*, 10 Pick., 129; and see *Simmons v. Cates*, 56 Ga., 609.

<sup>9</sup> *Harding v. Tift*, 75 N. Y., 461; *Wilson v. Allen*, 11 Oregon, 154.

<sup>10</sup> *Harding v. Tift*, *supra*.

<sup>11</sup> *Sneed v. Wister*, 2 A. K. Marsh., 277; but see *Van Renssellar v. Roberts*, 5 Denio, 470.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Stanwood v. Owen*, 14 Gray, 195; and see *Wiesenfeld v. Byrd*, 17 S. C., 106; and see, where changes in the membership of the firm has occurred, *Morgan v. Tarbell*, 28 Vt., 498; *St. Louis Type Foundry Co. v. Wisdom*, 4 Lea, 695.

Where the application has once been made, it cannot be changed without the consent, not merely of the parties to the payment, but also of all who would be affected by the change, as sureties, joint debtors, and the like.<sup>1</sup>

The time within which the creditor may make the application, where the debtor makes none, is a matter upon which the authorities are by no means agreed. Some courts have held that it cannot be suffered to change as the creditor's own interests may dictate, but must be made directly,<sup>2</sup> or, at least, within a reasonable time;<sup>3</sup> others, that it may be made at any time before a controversy has arisen, but not after;<sup>4</sup> while in others, it is held that the application may be made at any time before verdict or judgment.<sup>5</sup> The principle suggested in *Pattison v. Hull*,<sup>6</sup> namely, that, where it is altogether immaterial to the debtor, the creditor should be allowed to appropriate the payment to whichever debt he pleases at any time, but that, where it is material, the law must determine the appropriation where the creditor fails to do so within a reasonable time, has much to commend it.

In the third place, and lastly upon the subject of the application of payments, where neither the debtor nor the creditor has done so, the law must make the appropriation. The rules for determining the application in such cases are not entirely harmonious. Under the civil law, where no application was made either by the debtor or creditor, the rule was that it should be made in the manner most beneficial to the debtor, as being in accordance with his presumed intention; and this rule has been followed by a number of cases, English and American;<sup>7</sup> as, for example, to an interest bearing rather than to a non-interest bearing debt,<sup>8</sup> to a specialty rather

<sup>1</sup> *Thayer v. Denton*, 4 Mich., 192; *Miller v. Montgomery*, 31 Ill., 350; *Bank v. Meredith*, 2 Wash., 47; *Chancellor v. Schott*, 23 Pa. St., 68; *Offitt v. King*, 1 McArthur, 312.

<sup>2</sup> *Hill v. Sutherland*, 1 Wash., 128.

<sup>3</sup> *Harker v. Conrad*, 12 S. & R., 301; s. c., with note, 14 Am. Dec., 691; *Briggs v. Williams*, 2 Vt., 283; *Fairchild v. Holly*, 10 Conn., 176.

<sup>4</sup> *National Bank v. Mechanics' Bank*, 94 U. S., 439; *Haynes v. Waite*, 14 Cal., 446; *Mayor, etc., v. Patten*, 4 Cranch, 317; *Jones v. United States*, 7 How., 681; *Robinson v. Doolittle*, 12 Vt., 246; *Applegate v. Koons*, 74 Ind., 247; and see *California Bank v. Webb*, 94 N. Y., 467.

<sup>5</sup> *Brice v. Hamilton*, 12 S. C., 32.

<sup>6</sup> 9 Cow., 747.

<sup>7</sup> See *Pattison v. Hull*, 9 Cow., p. 765 *et seq.*, and citations.

<sup>8</sup> *Hamer v. Kirkwood*, 25 Miss., 95-99; and see *Scott v. Fisher*, 4 T. B. Mon., 387; *Gwinn v. Whitaker*, 1 H. & J., 754; *Laeber v. Langhor*, 45 Md., 482.

than to a simple contract debt,<sup>1</sup> and to a secured rather than to an unsecured debt.<sup>2</sup> Other courts, on the contrary, hold that, the creditor having the right to apply as he pleases where the debtor has not exercised his right of direction, the application most favorable to the creditor must be made; as, for instance, to an unsecured rather than to a secured debt, provided there is no surety to be prejudiced;<sup>3</sup> or to a several rather than to a joint and several debt, unless the payment proceeded from a joint source.<sup>4</sup> But perhaps the weight of American authority favors the principle that payments in such cases are to be applied according to the intrinsic justice and equity of the particular case;<sup>5</sup> as to a barred debt rather than to one not so, where both were enforceable at the time of the payment,<sup>6</sup> or to the most precarious debt.<sup>7</sup> The application is always to the earliest debt due at the time of the payment, if there be no equity or reason for a different course;<sup>8</sup> even though the earlier items accrued during infancy,<sup>9</sup> or arise out of conditional sales of property which is to remain the vendor's until fully paid for.<sup>10</sup> In equity the application is to the earlier items, even though they are secured and the later ones are not so;<sup>11</sup> and this is the rule at law in some of the States.<sup>12</sup>

Upon the principle that payments will be applied justly and

<sup>1</sup> *Gwinn v. Whitaker*, *supra*, 755.

<sup>2</sup> *Windsor v. Kennedy*, 52 Miss., 164; *Moore v. Kiff*, 78 Pa. St., 96.

<sup>3</sup> *Pierce v. Sweet*, 33 Pa. St., 151; *Langdon v. Bowen*, 46 Vt., 512; *Tullinger v. Kofoed*, 7 Oregon, 228; *Bowen v. Fridley*, 8 Ill. App., 595; *Shellabarger v. Binns*, 18 Kas., 345; *Planters' Bank v. Stockman*, 1 Freem. Ch. 502.

<sup>4</sup> *Livermore v. Clarridge*, 33 Me., 428.

<sup>5</sup> 2 Greenl. Ev., 529, 533; *Seymour v. Van Slyck*, 8 Wend., 403; *U. S. v. Wardwell*, 5 Mason, 85; *Buster v. Holland*, 27 W. Va., 510; *U. S. v. Kirkpatrick*, 9 Wheat., 720; *Briggs v. Williams*, 2 Vt., 283; *Pierce v. Knight*, 31 Vt., 701; *Randall v. Parramore*, 1 Fla., 409; *Callohan v. Boazman*, 21 Ala., 246; *Bayley v. Wynkoop*, 10 Ill., 449; *Young v. Woodward*, 44 N. H., 250; *Smith v. Lloyd*, 11 Leigh, 512.

<sup>6</sup> *Robinson v. Allison*, 36 Ala., 525.

<sup>7</sup> *Field v. Holland*, 6 Cr., 28; s. c., with discussion of subject, 1 Am. Lead. Cas., 5th ed., 334.

<sup>8</sup> *Leef v. Goodwin*, Taney's R., 460; *Sprague v. Hazenwinkle*, 53 Ill., 419; *Thompson v. Phelan*, 22 N. H., 339; *State v. Chadwick*, 10 Oregon, 423; *McKenzie v. Nevins*, 22 Me., 138.

<sup>9</sup> *Thurlow v. Gilmore*, 40 Me., 378.

<sup>10</sup> *Crompton v. Pratt*, 105 Mass., 255.

<sup>11</sup> *Truscott v. King*, 6 N. Y., 147; *Cushing v. Wyman*, 44 Me., 121.

<sup>12</sup> *Worthley v. Emerson*, 116 Mass., 374.

equitably by the law, collections made and accounted for by a financial officer, who has given successive bonds with different sureties, will be applied to the respective periods within which they were made.<sup>1</sup> And so a general payment, or provision for payment, on account of several debts, none of which are barred at the time, will be applied *pro rata* to them all, and take all out of the statute of limitations.<sup>2</sup> The law will not, though, as we have seen, the creditor may,<sup>3</sup> apply a payment to a debt already barred by limitations if it can be attributed to a debt not barred;<sup>4</sup> nor ascribe it to an illegal debt where there is also a legal one;<sup>5</sup> as to usurious interest instead of to a legal principal;<sup>6</sup> though, where the payment, when made, was intended to be applied to the interest, it will be so appropriated;<sup>7</sup> and where the payment exceeds the lawful debt the excess will be applied to the illegal.<sup>8</sup> Where the debtor pays money on account of several debts, without specifying the apportionment, it will be applied *pro rata*.<sup>9</sup>

When a person becomes so embarrassed as to be unable to pay all his debts in full, he usually endeavors to enter into a composition with his creditors, prevailing on them to accept so much in the pound, and to allow a given time for payment. In this case a *letter of license* is generally given by the creditors, by which they covenant not to take any proceedings for their debts in the meantime; and this license is frequently embodied in a *deed of inspection*, by which certain inspectors are appointed to watch the winding-up of the debtor's affairs on behalf of the creditors. The payment of the composition is sometimes guaranteed by some friends of the debtor as his sureties; and, when payment is made, a release of all demands is given by the creditors. If, however, the composition should not be punctually paid, the creditors will no longer be restrained from proceeding to enforce the full payment

<sup>1</sup> U. S. v. January, 7 Cr., 572; Pickering v. Day, 2 Del. Ch., 333. And see Helm v. Commonwealth, 79 Ky., 67.

<sup>2</sup> Taylor v. Foster, 132 Mass., 30; Jackson v. Burke, 1 Dill., 311.

<sup>3</sup> *Supra*, p. 158.

<sup>4</sup> Byles on Bills, 230-31, and citations.

<sup>5</sup> *Ibid.*; Bachman v. Wright, 27 Vt., 187.

<sup>6</sup> Cadiz Bank v. Slemmons, 34 Ohio, 142.

<sup>7</sup> Kendall v. Vanderlip, 2 Mackey, 105; Cobb v. Morgan, 83 N. C., 211.

<sup>8</sup> Hall v. Clement, 41 N. H., 166. And see Dunbar v. Garrity, 58 N. H., 575.

<sup>9</sup> White v. Blakemore, 8 Lea, 49.

of their debts.<sup>1</sup> Such creditors as hold security for their debts should openly stipulate that their securities are not to be affected; and such a stipulation will be sufficient to preserve them.<sup>2</sup> But any secret agreement between the debtor and a creditor, by which he is to have any advantage over the others, in order to induce him to agree to the composition, is evidently a fraud on the other creditors, and as such is absolutely void,<sup>3</sup> and prevents the creditor who is party to it from suing for his share in the composition.<sup>4</sup>

Where an insolvent debtor is unable to effect a composition, the usual course, in the absence of a bankruptcy or insolvent law, is to make a general assignment for the benefit of creditors. In some jurisdictions partial assignments, *i.e.*, assignments not conveying the whole of the debtor's property, have been held valid in the absence of statutory provisions to the contrary, provided the residue be left open to creditors.<sup>5</sup> But the weight of authority seems to be that the assignment will be invalid unless it conveys all the assignor's property liable for his debts,<sup>6</sup> though property which is by law exempt from execution may be expressly excepted.<sup>7</sup> If made by a partnership, the partners must assign their individual as well as their partnership property.<sup>8</sup> In the absence of statutory prohibition, the assignor may prefer one creditor to another;<sup>9</sup> and

<sup>1</sup> *Cranley v. Hillary*, 2 M. & Selw., 120.

<sup>2</sup> *Nichols v. Morris*, 3 B. & Ad., 41 (23 E. C. L.); *Ex parte Glendinning*, Buck, 517; *Lee v. Lockhart*, 3 Myl. & Cr., 302; *Cullingworth v. Lloyd*, 3 Beav., 385, and the cases collected, 395; *Bush v. Shipman*, 14 Sim., 239.

<sup>3</sup> *Leicester v. Rose*, 4 East., 372; *Knight v. Hunt*, 5 Bing., 432 (15 E. C. L.); *Pendlebury v. Walker*, 4 You. & Col., 424; *Alsager v. Spalding*, 4 N. C., 407; *Higgins v. Pitt*, 4 Ex. Rep., 312; *Pfeffer v. Browne*, 23 Beav., 391; *Mare v. Warner*, 3 Giff., 100; *Mare v. Earle*, *Ibid.*, 108.

<sup>4</sup> *Howden v. Haigh*, 11 Ad. & E., 1033 (39 E. C. L.); *Ex parte Oliver*, 4 De Gex & Smale, 354; see *Atkinson v. Benby*, 7 H. & N., 934.

<sup>5</sup> *Canal Bank v. Cox*, 4 Greenl., 395; *Heckman v. Messenger*, 49 Pa. St., 465.

<sup>6</sup> *Brashear v. West*, 7 Pet., 608; *Green v. Trieber*, 3 Md., 11.

<sup>7</sup> *Hartzler v. Tootle*, 85 Mo., 23; *Smith v. Mitchell*, 12 Mich., 180; *Garner v. Frederick*, 18 Ind., 507; *Heckman v. Messenger*, *supra*; *contra*, *Sugg v. Tillman*, 2 Swan, 208.

<sup>8</sup> *Insurance Co. v. Wallis*, 23 Md., 173, 182; *Maughlin v. Tyler*, 47 Md., 545. But see *Hubler v. Waterman*, 33 Pa. St., 414; in the latter State, however, partial assignments are permissible; *Heckman v. Messenger*, *supra*.

<sup>9</sup> *Marbury v. Brooks*, 7 Wheat., 556; *Spring v. S. C. Ins. Co.*, 8 Wheat., 268; *Brooks v. Marbury*, 11 Wheat., 78; *Tompkins v. Wheeler*, 16 Pet., 106; *Brashear v. West*, 7 Pet., 608.

may prefer creditors who will give a release in full over those who refuse to release; but may not reserve to himself any part of the property which would be liable for his debts or any benefit therefrom,<sup>1</sup> or direct the payment of the surplus, or any part thereof, to himself before all creditors, non-releasing as well as releasing, have been paid in full.<sup>2</sup> Care must be taken to exclude all provisions which could be construed as intended to hinder, delay or defraud creditors; thus, where assent of creditors is required, a reasonable time within which such assent shall be given must be limited,<sup>3</sup> and the assignee cannot be authorized to retain the property to await a rise in price or a more favorable market,<sup>4</sup> nor to continue the business,<sup>5</sup> except as ancillary to winding it up and to prevent undue and unnecessary sacrifice.<sup>6</sup>

<sup>1</sup> *Lukins v. Aird*, 6 Wall., 78; *Green v. Trieber*, 3 Md., 11.

<sup>2</sup> *Brashear v. West*, *supra*; *Green v. Trieber*, *supra*; *Sangston v. Gaither*, 3 Md., 40; *Barney v. Guffin*, 2 N. Y., 365; *Goodrich v. Down*, 6 Hill, 438; but see *Halsey v. Whitney*, 4 Mason, 206, 222-3; *Pearpoint v. Graham*, 4 Wash., C. C., 235, 237.

<sup>3</sup> *Green v. Trieber*, *supra*.

<sup>4</sup> *Maughlin v. Tyler*, 47 Md., 545, 550.

<sup>5</sup> *Jones v. Syer*, 52 Md., 211; s. c., 36 Am. Rep., 366.

<sup>6</sup> *Janes v. Whitbread*, 5 Eng. L. & Eq. R., 431; *Cunningham v. Freeborn*, 11 Wend., 240; *De Forest v. Bacon*, 2 Conn., 633; *Kendall v. New England Carpet Co.*, 13 Conn., 382, 391; *Woodward v. Marshall*, 22 Pick., 474; *Brahmstadt v. McWhirter*, 9 Neb., 6; s. c., with note, 31 Am. Rep., 396.

## CHAPTERS IV. AND V.

### OF BANKRUPTCY AND INSOLVENT LAWS.

"BANKRUPTCY of Traders" and "Bankruptcy of Non-Traders" are the topics discussed in the fourth and fifth chapters of former editions of this work. The distinction between these two species of bankruptcy and the entire law relating to each, as set forth in those chapters, rest upon certain modern English statutes which are wholly without effect in the United States; and the text of those chapters is, therefore, omitted from the present edition.

The word bankrupt is derived from the French word *banque*, a bench or counter, and the Norman French *roupt*, broken; and has been judicially defined as a broken or ruined trader.<sup>1</sup> The English bankrupt laws, accordingly, formerly applied only to traders; but the later acts there, as in America, extended the same or similar relief to the cases of insolvent persons who were not traders. In America, the eighth section of Article I. of the Constitution confers upon Congress power to establish "uniform Laws on the subject of Bankruptcies throughout the United States;" and this power has several times been exercised. All such laws having now been repealed, however, it is unnecessary, and would perhaps be unprofitable, to enter upon any extended consideration of their provisions, or of the adjudications under them, especially since, being purely creatures of statutes, differences in the phraseology of future enactments upon the subject will necessarily largely affect the value of earlier decisions or principles deducible from them. The leading features of the system are: the summary seizure, at the instance of creditors, of all the debtor's property; or, in the case of voluntary bankruptcy, his own surrender of it; its distribution among the creditors; and the debtor's discharge, under such conditions as the act may impose, from further liability.

The difference between a bankrupt and an insolvent law lies in the last-mentioned particular, viz., discharge from liability, the

<sup>1</sup> *Everett v. Stone*, 3 Story, 453.



effect of insolvent laws, strictly so-called, being to relieve the insolvent from exposure to imprisonment for debt and the like, but leaving his future acquisitions of property liable for his debts. But this distinction has not been strictly regarded, and our highest court has plainly intimated that it will be disposed to regard the terms as synonymous wherever occasion may require.<sup>1</sup>

After much and able discussion, and considerable differences of opinion among the members of the court, the same tribunal has finally determined that this power of Congress to establish uniform bankruptcy laws throughout the States does not exclude the right of the several States to legislate upon the same subject, except when the power is actually exercised by Congress, nor even then unless the State laws conflict with those established by Congress; that State insolvent or bankruptcy acts, which discharge both the debtor's person and his future acquisitions, are valid as to debts contracted after their passage, though invalid as to prior debts by reason of the constitutional prohibition against the passage *by the States* of laws impairing the obligation of contracts; and that certificates of discharge under such State laws are ineffectual as a defence against suits by citizens of any other State, brought either in the courts of other States than that in which the discharge was obtained, or in the courts of the United States.<sup>2</sup> In the courts of some of the States, the validity of certificates of discharge under State bankruptcy laws has been sustained,<sup>3</sup> especially where the debt was expressly or presumptively payable in the State where the discharge was obtained;<sup>4</sup> but the later cases,<sup>5</sup> and the decided weight of authority, are to the effect that no discharge under the insolvent laws of any State can affect debts due to citizens of other States, unless the

<sup>1</sup> *Sturges v. Crowninshield*, 4 Wheat., 194. See, on this subject, *Sackett v. Andross*, 5 Hill, 329; *McCormick v. Pickering*, 4 N. Y., 283; 2 Kent Com., 390-94.

<sup>2</sup> *Ogden v. Saunders*, 12 Wheat., 213; *Sturges v. Crowninshield*, 4 Wheat., 122; *McMillan v. McNeil*, *Ibid.*, 209; *Farmers & Mechanics' Bank v. Smith*, 6 Wheat., 131; *Shaw v. Robbins*, 12 Wheat., 369; *Baldwin v. Hale*, 1 Wall., 223; *Cook v. Moffatt*, 5 How., 295; *Gilman v. Lockwood*, 4 Wall., 409; *Edwards v. Kearzey*, 96 U. S., 595.

<sup>3</sup> *Lewis v. Norwood*, 4 Harr. (Del.), 460; *Wheelock v. Leonard*, 20 Pa. St., 440; *Brown v. Collins*, 41 N. H., 405.

<sup>4</sup> *Scribner v. Fisher*, 2 Gray, 43; *Webster et al. v. Rees*, 23 Iowa, 269.

<sup>5</sup> *Kelly v. Drury*, 9 Allen, 27; *Newmarket v. Butler*, 45 N. H., 236; *Hawley v. Hunt*, 27 Iowa, 303.

creditor appears and voluntarily submits to the jurisdiction of the court granting the discharge by becoming a party to the proceedings, or claiming or receiving dividends thereunder.<sup>1</sup> And though the creditor appear, if it be for the purpose merely of resisting the discharge, such appearance will not render the discharge valid elsewhere as against him.<sup>2</sup> A discharge under an insolvent law of the State in which both the parties resided when the contract was entered into, the law being in force when the contract was made, has been held binding, although the creditor has removed from the State before the discharge was applied for;<sup>3</sup> the law providing for discharge of the debtor otherwise than by payment, in case of his insolvency, being treated, under such circumstances, as part of the contract.

<sup>1</sup> *Donnelly v. Corbett*, 7 N. Y., 500; *Soule v. Chase*, 39 N. Y., 342; *Felch v. Bugbee*, 48 Me., 9; *Poe v. Duck*, 5 Md., 1; *Easterly v. Goodwin*, 35 Conn., 279; *Walsh v. Nourse*, 5 Binn., 381; *Crow v. Coons*, 27 Mo., 512; *Pugh v. Bussell*, 2 Blackf., 394; *Beer v. Hooper*, 32 Miss., 246; *Beers v. Rea*, 5 Tex., 349; *Baldwin v. Hale*, *supra*; 5 Halst. (N. J. Law) 208, overruling *Rowland v. Stevenson*, 1 Halst., 149; *Blackman v. Green*, 24 Vt., 17.

<sup>2</sup> *Phillips v. Allan*, 8 Barn. & Cress., 477 (15 E. C. L.); *Collins v. Rodolph*, 3 Greene, Iowa, 299.

<sup>3</sup> *Stoddard v. Harrington*, 100 Mass., 87; s. c., 1 Am. Rep., 92; *Stevens v. Norris*, 30 N. H., 466; *Stone v. Tibbitts*, 26 Me., 110.

## CHAPTER VI.

### OF INSURANCE.

HAVING now considered, though very briefly, the subject of debts generally, there remain certain debts, payable on contingencies, which deserve a separate notice, namely, debts arising under contracts to insure effected by policies of insurance. A policy of insurance, or assurance, is the name given to an instrument by which a contract to insure is entered into; and a contract to insure is a contract either to indemnify against a loss which may arise on the happening of some event, or to pay, on the happening of some event, a sum of money to the person insured. The most usual kinds of insurance are insurance of *lives*, insurance against loss by *fire*, and insurance of *ships* and their cargoes against the perils of the seas.

And, first, as to life insurance. The advantages of life insurance are now so well known that there is no occasion to dilate upon them. By payment of a small annual premium during the life insured, a sum of money may be secured at his decease, applicable to the payment of his debts, for a provision for his family, or for various other purposes. Every person is considered to have a sufficient interest in the duration of his own life to sustain his own insurance of it; but if he should afterwards put an end to his life, or die by the sentence of the law, the insurance will be void in the hands of his executors; and no provision to the contrary contained in the policy of insurance will be of any avail.<sup>1</sup>

But, according to the weight of American authority, suicide will not invalidate the policy, even though expressly excepted in it, if induced by insanity.<sup>2</sup> Not only so, but suicide through insanity is held to be an *accident*, within the terms of a policy of insurance against accidents, although the policy, by its terms, excepted both suicide and death caused, either wholly or in part, by bodily

<sup>1</sup> *Amicable Assurance Society v. Bolland*, 4 Bligh, N. S., 194, reversing *Bolland v. Disney*, 3 Russ., 351; see *Clift v. Schwabe*, 3 C. B., 437 (54 E. C. L.).

<sup>2</sup> See *Connecticut Mutual Life Ins. Co. v. Lathrop*, 111 U. S., 612.

infirmities and disease.<sup>1</sup> But, if the policy except the case of suicide, whether the insured, at the time thereof, be sane or insane, self-destruction relieves of liability.<sup>2</sup>

Where one who takes out a policy of insurance upon the life of another, has no insurable interest in the life of the latter, the policy is void, as being a mere wager against the continuance of a human life and, therefore, repugnant to public policy. What is an insurable interest, it is not easy to define with precision. "It may be stated generally, however, to be such an interest, arising from the relations of the party obtaining the insurance, either as creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation; for a parent has an insurable interest in the life of his child,<sup>3</sup> and a child in the life of his parent, a husband in the life of his wife, and a wife in the life of her husband. The natural affection in cases of this kind is considered as more powerful—as operating more efficaciously—to protect the life of the insured than any other consideration. But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood and affinity, to expect some benefit or advantage from the continuance of the life of the assured. Otherwise the contract is a mere wager, by which the party taking the policy is directly interested in the early death of the assured. Such policies have a tendency to create a desire for the event. They are, therefore, independently of any statute on the subject, condemned as being against public policy."<sup>4</sup> A policy on the life of a brother in favor of a married sister, in no way dependent upon him, is valid; and its validity is not impaired, as it might be between strangers, by the fact that the sister advanced the necessary means to take out the policy, and to keep up the payments upon it.<sup>5</sup> A surety upon an official bond has an insurable interest in the life of his principal,

<sup>1</sup> *Accident Ins. Co. v. Crandal*, 120 U. S., 527, and citations.

<sup>2</sup> *Travellers Ins. Co. v. McConkey*, 127 U. S., 661.

<sup>3</sup> *Contra* as to father and son in England, see *Halford v. Kymer*, 10 B. & C., 724.

<sup>4</sup> *Warnock v. Davis*, 104 U. S., 775; *Conn. Mut. Life Ins. Co. v. Schaefer*, 94 U. S., 460.

<sup>5</sup> *Ætna Life Ins. Co. v. France*, 94 U. S., 561.

and a policy so taken is valid whether a breach of the conditions of the bond ever occurs or not.<sup>1</sup>

Except in the case of a mere debt, to secure which a policy is taken out, and which is subsequently paid,<sup>2</sup> if an insurable interest existed when the policy was obtained, its validity is not affected by the termination of that interest before the death of the person upon whose life it was issued ; as, for example, where a policy on the life of a husband in favor of his wife was kept up by the latter after a divorce *a vinculo* and her subsequent remarriage.<sup>3</sup> Where the insurable interest results from the relation of debtor and creditor, the latter is entitled to the proceeds only to the extent of his debt and advances, and is accountable for the residue to the personal representatives of the insured ;<sup>4</sup> and so, where a policy is assigned under a contract that the assignee will make all payments necessary to keep it alive, and shall receive therefor a stipulated proportion of the proceeds, the latter can retain only the payments advanced by him, and must account for the residue to the personal representatives of the insured.<sup>5</sup>

A distinction, however, is to be noted between the case of a policy originally taken out by, or subsequently assigned to, a stranger, upon an undertaking upon his part to keep up the payments, or otherwise upon a consideration, in which case an insurable interest in the life insured is essential to the validity of the transaction ; and the case in which one gratuitously insures his own life, or assigns a policy upon it, for the benefit of a stranger, he himself making the necessary payments to keep it alive.<sup>6</sup> "There is no doubt that a man may effect an insurance on his own life for the benefit of a relative or friend."<sup>7</sup>

A policy upon a husband's life in favor of his wife or children, if moderate in amount, is not subject to the claims of his creditors, although the premiums were paid by him while insolvent. A hus-

<sup>1</sup> *Scott v. Dickson's Adm'r*, 108 Pa. St., 6 ; s. c., 56 Am. Rep., 192.

<sup>2</sup> *Conn. Mut. Life Ins. Co. v. Schaefer*, 94 U. S., 661-2. But see *Central Bank v. Hume*, 128 U. S., 205.

<sup>3</sup> *Ibid.* ; *Scott v. Dickson, Admr., supra*. *Dolby v. India, etc., Assurance Co.*, 15 C. B., 365 ; *Law v. London Indisputable Life Policy Co.*, 1 Kay & John., 223.

<sup>4</sup> *Camnack v. Lewis*, 15 Wall., 643.

<sup>5</sup> *Warnock v. Davis*, 104 U. S., 775, where see citations *pro* and *con*.

<sup>6</sup> *Scott v. Dicksop, Admr., supra*.

<sup>7</sup> *Conn. Mut. Life Ins. Co. v. Schaefer*, 94 U. S., 460.

band and father may rightfully devote a moderate portion of his earnings to insure his life, and thus make reasonable provision for his family after his decease.<sup>1</sup> It is otherwise if the policy was originally taken out for the benefit of his estate, and, after his embarrassment, assigned for the benefit of his wife and children; for this, like any other voluntary disposition of a debtor's property, is ineffectual as against his creditors.<sup>2</sup>

Insurance against fire is a contract to indemnify against loss by fire, and is usually renewed from year to year on payment of a premium. The person who effects such an insurance must have an interest in the property insured, and he cannot recover beyond the extent of his interest; neither can he assign his policy without the consent of the insurers.<sup>3</sup> A trustee, however, though having no personal beneficial interest in the property, may procure insurance upon it to its full value.<sup>4</sup>

The insurance of ships and their cargoes from the perils of the sea is a matter belonging rather to mercantile law than to the department of conveyancing. In this kind of insurance, as well as in the others, an interest in the property insured must generally belong to the party effecting the insurance. Full information on the subject of marine insurance will be found in Park on Insurance, Arnould on Marine Insurance, Abbott on Shipping, and in the chapter on maritime insurance in the late J. W. Smith's admirable Compendium of Mercantile Law. Connected with maritime insurance are *bottomry* and *respondentia*. Bottomry is an agreement by which a vessel is hypothecated or pledged by the owner for the payment, in the event of her voyage terminating successfully, of money advanced to him for the necessary use of the vessel, together with the interest, which interest, in consideration of the risk incurred, is generally far beyond five per cent., formerly the legal rate.<sup>5</sup> Respondentia is a somewhat similar contract with respect to the cargo, except that the borrower only is responsible in the event of the safe termination of the voyage, the lender having no lien on the goods.<sup>6</sup>

<sup>1</sup> Central Bank v. Hume, 128 U. S., 195, and citations.

<sup>2</sup> *Ibid.*

<sup>3</sup> Lynch v. Dalzell, 4 Bro. Parl. Cas., 431; Saddler's Company v. Badcock, 2 Atk., 554.

<sup>4</sup> Ins. Co. v. Chase, 5 Wall., 509.

<sup>5</sup> Simonds v. Hodgson, 3 B. & Ad., 50 (23 E. C. L.).

<sup>6</sup> 2 Black. Com., 457.

## CHAPTER VII.

### OF ARBITRATION.

INSTEAD of the ultimate remedy of an action at law or suit in equity, recourse is sometimes had for the settlement of disputes to the more amicable expedient of arbitration. And, in some transactions, especially in articles of co-partnership between traders, it is usual to stipulate that, if any dispute shall arise, it shall be referred to the determination of two indifferent persons as arbitrators, or of their umpire, who is usually and very properly required to be chosen by the arbitrators before they proceed to take the subject in question into consideration.<sup>1</sup> And it is agreed that the award in writing of the arbitrators, or of their umpire in case of their disagreement, shall be binding and conclusive on all parties.

Where, under the provision that if the arbitrators named fail to agree they may select a third, an umpire or third arbitrator is called in, it is essential, unless waived by the parties, that a new hearing be allowed for re-presentation of the testimony and argument; and an award signed by two of the three, one of whom is the new one, who has not heard the parties or the evidence, is, without such waiver, void.<sup>2</sup>

Stipulations in articles of agreement or other contracts to refer to arbitration any disputes which may arise thereunder, do not, according to the weight of authority, preclude the parties from resort to the courts. When a right of action has accrued, the agreement between the parties is ineffectual to oust the jurisdiction of the courts.<sup>3</sup> Notwithstanding, therefore, such 'agreements, either party may sue in the courts,<sup>4</sup> in equity as well as at law.<sup>5</sup>

<sup>1</sup> See *Bates v. Cooke*, 9 B. & C., 407, 408 (17 E. C. L.).

<sup>2</sup> *Alexander v. Cunningham*, 111 Ill., 512.

<sup>3</sup> *Wellington v. Mackintosh*, 2 Atk., 569; *Waters v. Taylor*, 15 Ves., 10, 18; *Mexborough v. Bower*, 7 Beav., 127, 132; *Horton v. Sayers*, 4 H. & N., 643; *Cook v. Cook*, 15 W. R., 981; *Thompson v. Charnock*, 8 T. R., 139; *Tattersall v. Groote*, 2 B. & P., 132; *Haggard v. Morgan*, 1 Seld., 422; *Contee v. Dawson*, 2 Bl. Ch., 264, 276; *Ins. Co. v. Morse*, 20 Wall., 451-2. *Contra*, see *Monongahela Nav. Co. v. Fenlon*, 4 W. & S., 205.      <sup>4</sup> *Ibid.*      <sup>5</sup> *Story's Eq. Jur.*, § 670.

Courts of justice are presumed to be better capable of administering and enforcing the real rights of the parties than private arbitrators, as well from their superior knowledge as from their superior means of sifting the controversy to the bottom.<sup>1</sup>

But a contract may be so worded as to amount merely to an agreement to pay so much as an arbitrator may award, in which case there can be no right to sue until the award has been made.<sup>2</sup>

The reference of disputes to arbitration appears to have been early adopted by the courts of law, with the consent of the parties to an action, in cases where the matter in dispute could be more conveniently settled in this mode. A verdict was taken for the plaintiff by consent, subject to the award of an arbitrator agreed upon by the parties, and the reference was made a rule of court. This plan is still continually adopted. The arbitrators and the parties to the reference by this means become subject to the jurisdiction of the court, which has power to set aside any award which may appear to have been given unjustly or through mistake of the law; or, if the award be valid, its performance may be enforced under the penalty of imprisonment for contempt of court. In order to extend the benefits of this mode of submission to arbitration to all cases of controversies between merchants and traders or others concerning matters of account or trade or other matters, an act of parliament was passed in the reign of William the Third, intituled "An Act for determining Differences by Arbitration."<sup>3</sup> This act empowers all merchants and traders and others desiring to end by arbitration any controversy, for which there is no other remedy but by personal action or suit in equity, to agree that their submission of their suit to the award or umpirage of any person or persons shall be made a rule of any of her majesty's courts of record which the parties shall choose. And it provides that, in case of disobedience to the arbitration or umpirage to be made pursuant to such submission, the party neglecting or refusing to perform and execute the same, or any part thereof, shall be subject to all the penalties of contemning a rule of court when he is a suitor or defendant in such court. And the process to be issued accordingly

<sup>1</sup> *Ibid.*

<sup>2</sup> *Scott v. Avery*, 5 H. of L. Cases, 811; *Scott v. Corporation of Liverpool*, 3 De G. & J., 334; *Elliott v. Royal Exchange Assurance Company*, Law Rep., 2 Ex., 237.

<sup>3</sup> Stat. 9 & 10 Will. III., c., 15.



shall not be stopped or delayed in its operation by any order, rule, command or process of any other court, either of law or equity, unless it shall be made to appear on oath to such court that the arbitrators or umpire misbehave themselves, and that such award, arbitration or umpirage was procured by corruption or other undue means. It is also further provided<sup>1</sup> that any arbitration or umpirage procured by corruption or undue means shall be judged void, and be set aside by any court of law or equity, so as complaint of such corruption or undue practice be made in the court where the rule is made for submission to such arbitration or umpirage before the last day of the next term after such arbitration or umpirage is made and published to the parties. The Court of Chancery is a court of record within the meaning of this act.<sup>2</sup>

When no time is limited for the making of the award, it must be made within a reasonable time;<sup>3</sup> but if a given time be limited, the award must be made within that time, unless the time for making it be enlarged.<sup>4</sup> And if the award is required to be made and ready to be delivered to the parties by a certain day, it will be considered as ready to be delivered if it be made,<sup>5</sup> unless the arbitrators should fail to deliver it to either of the parties on request made for that purpose on the last day.<sup>6</sup> The submission to arbitration frequently contains a power for the arbitrators or umpire to enlarge the time for making the award; and in this case the time may be enlarged from time to time<sup>7</sup> by such arbitrators or umpire,<sup>8</sup> provided the enlargement be made on or before the expiration of the time originally limited for making the award.<sup>9</sup> And if the submission be made a rule of court, then, whether the arbitrators or umpire have power to enlarge the time or not,<sup>10</sup> the court, or a judge thereof, has power to enlarge the time.<sup>11</sup> And should

<sup>1</sup> Sect. 2.

<sup>2</sup> *Heming v. Swinnerton*, 2 Phil., 79.

<sup>3</sup> *MacDougall v. Robertson*, 2 Y. & J., 11; s. c., 4 Bing., 435 (13 E. C. L.).

<sup>4</sup> 1 Wms. Saund., 327 a. n. (3).

<sup>5</sup> *Bradsey v. Clyston*, Cro. Car., 541.

<sup>6</sup> *Brooke v. Mitchell*, 6 M. & W., 473.

<sup>7</sup> *Payne v. Deakle*, 1 Taunt., 509; *Barrett v. Parry*, 4 Taunt., 658.

<sup>8</sup> See *Dimsdale v. Robertson*, 2 Jones & Lat., 58.

<sup>9</sup> See *Reid v. Fryatt*, 1 M. & Selw., 1; *Mason v. Wallis*, 10 B. & C., 107 (21 E. C. L.).

<sup>10</sup> *Parbery v. Newnham*, 7 M. & W., 378; *Leslie v. Richardson*, 6 C. B., 378 (60 E. C. L.).

<sup>11</sup> Stat. 3 & 4 Will. IV, c. 42, s. 39; *Re Warner and Powell's Arbitration*, V.-C. S., Law Rep., 3 Eq., 261.

no enlargement be formally made, yet the parties may, by continuing their attendance on the reference, or by recognizing the proceedings under it, virtually empower the arbitrators or umpire to make a valid award subsequently to the time originally limited.<sup>1</sup>

In proceeding in the business of the arbitration, the arbitrators are bound to require the attendance of the parties, for which purpose notice of the meeting of the arbitrators should be given to them.<sup>2</sup> But if either party neglect to attend either in person or by attorney, after due notice, the arbitrators may proceed without him.<sup>3</sup> In taking the evidence the arbitrators are at liberty to proceed in any way they please, if the parties have due notice of their proceedings, and do not object before the award is made.<sup>4</sup> But each must use his own judgment;<sup>5</sup> and in order to obviate any objection, they ought to proceed in the admission of evidence according to the ordinary rules of law.<sup>6</sup> The award should be signed by the arbitrators in each other's presence;<sup>7</sup> and, when made, it must be both certain and final. Thus, if the award be that one party enter into a bond with the other for his quiet enjoyment of certain lands, this award is void for uncertainty; for it does not appear in what sum the bond should be.<sup>8</sup> With regard to certainty, however, the rule of law is *id certum est quod certum reddi potest*; and therefore an award that one of the parties should pay the costs of an action is good without fixing the amount of the costs, for that may be ascertained by the taxing officer.<sup>9</sup> On the question of finality many cases have arisen. If the arbitrators be *empowered* to decide all matters in difference between the parties, the award will not necessarily be wanting in finality for not deciding on all such matters, unless it appear to have been *required* that all such matters should be determined by the award.<sup>1</sup> If the award reserve

<sup>1</sup> *Rex v. Hill*, 7 Price, 636.

<sup>2</sup> *Anon.*, 1 Salk., 71.

<sup>3</sup> *Harcourt v. Ramsbottom*, 1 Jac. & Walk., 512; *Scott v. Van Sandau*, 6 Q. B., 237 (51 E. C. L.).

<sup>4</sup> *Ridout v. Pye*, 1 Bos. & P., 91.

<sup>5</sup> *Whitmore v. Smith*, 5 H. & N., 824.

<sup>6</sup> *Attorney-General v. Davison*, McCle. & Yo., 160.

<sup>7</sup> *Stalworth v. Inns*, 13 M. & W., 466; *Wade v. Dowling*, Q. B., 18 Jur., 728; s. c., 4 E. & B., 44 (82 E. C. L.); *Eads v. Williams*, 4 De G., M. & G., 674, 688.

<sup>8</sup> *Samon's Case*, 5 Rep., 77 b.

<sup>9</sup> *Cargey v. Aitcheson*, 2 B. & C., 170 (9 E. C. L.); s. c., 3 D. & R., 433; 2 Wms. Saund., 293 b. n. (a).

<sup>10</sup> *Wrightson v. Bywater*, 3 M. & W., 199; 1 Wms. Saund., 32 a, n. (a).

to the arbitrators,<sup>1</sup> or give to any other person,<sup>2</sup> or to one of the parties,<sup>3</sup> any further authority or discretion in the matter, it will be bad for want of finality. And if the award be that any stranger to the reference should do an act, or that money should be paid to, or any other act done in favor of, a stranger, unless for the benefit of the parties,<sup>4</sup> such award will be void.<sup>5</sup> An award, however, may be partly good and partly bad, provided the bad part is independent of and can be separated from that which is good.<sup>6</sup> But if, by reason of the invalidity of part of the award, one of the parties cannot have the advantage intended for him as a recompense for that which he is to do, according to that part of the award which would otherwise be valid, the whole will be void.<sup>7</sup> If it should appear on the face of the award that the arbitrators, intending to decide a point of law, have fallen into an obvious mistake of the law, the award will be invalid.<sup>8</sup> But where subjects involving questions both of law and fact are referred to arbitration, the arbitrators may make an award according to what they believe to be the justice of the case, irrespective of the law on any particular point.<sup>9</sup> There must be more than an error of judgment, as, for example, corruption, or gross mistake, apparent on the face of the award, or from the evidence, to induce the court to interfere.<sup>10</sup>

When the submission to arbitration is not made the rule of any other court,<sup>11</sup> the Court of Chancery, according to the ordinary principles of equity, has power to set aside the award for corruption or other misconduct on the part of the arbitrators, or if they should be mistaken in a plain point of law or fact.<sup>12</sup> If the submission be made a rule of court under the above-mentioned statute of Will. III.,<sup>13</sup> the court of which it is made a rule has power to

<sup>1</sup> *Manser v. Heaver*, 3 B. & Ad., 295 (23 E. C. L.).

<sup>2</sup> *Tomlin v. Mayor of Fordwich*, 5 Ad. & E., 147 (31 E. C. L.).

<sup>3</sup> *Glover v. Barrie*, 1 Salk., 71.

<sup>4</sup> *Wood v. Adcock*, 7 Ex. Rep., 468.

<sup>5</sup> *Cooke v. Whorwood*, 2 Saund., 337; *Adam v. Statham*, 2 Lev., 235; *Fisher v. Pimbley*, 11 East, 188.

<sup>6</sup> *Fox v. Smith*, 2 Wils., 267; *Aitcheson v. Cargey*, 2 Bing., 199 (9 E. C. L.).

<sup>7</sup> 2 Wms. Saund., 293 b, n. (1).

<sup>8</sup> *Ridout v. Pain*, 3 Atk., 494; *Richardson v. Nourse*, 3 B. & Ald., 237 (5 E. C. L.).

<sup>9</sup> *Re Badger*, 2 B. & Ald., 691; *Young v. Walker*, 9 Ves., 364; *Hodgkinson v. Fernie*, 3 C. B. N. S., 189 (91 E. C. L.).

<sup>10</sup> *Burchell v. Marsh*, 17 How., 344.

<sup>11</sup> *Nichols v. Roe*, 3 Myl & K., 431.

<sup>12</sup> *Ridout v. Pain*, 3 Atk., 494.

<sup>13</sup> Stat. 9 & 10 Will. III., c. 15.

set aside the award, not only on the grounds of corruption or undue practice mentioned in the act, but also for mistakes in point of law;<sup>1</sup> and no other court has a right to entertain any application for this purpose.<sup>2</sup> The application to set aside the award must, however, be made within the time limited by the act.<sup>3</sup> But, although the time limited by that statute may have expired, yet if there be any defect apparent on the face of the award, the court will not assist in carrying it into effect by granting an attachment for its non-performance.<sup>4</sup> If the submission to arbitration be made by rule or order of the court in any cause independently of the statute, the court still retains its ancient jurisdiction of setting aside the award on account either of the misconduct of the arbitrators, or of their mistake in point of law.<sup>5</sup> In analogy, however, to the practice under the statute of Will. III., the court in ordinary cases requires application for setting aside the award to be made within the time limited by that statute;<sup>6</sup> but upon sufficient grounds it will grant such an application, though made after the expiration of that time.<sup>7</sup>

It is usual to provide for the appointment of an umpire in case the parties should disagree; and, if an umpire be appointed, his authority to make an award commences from the time of the disagreement of the arbitrators,<sup>8</sup> unless some other period be expressly fixed; and if, after the disagreement of the arbitrators, he make an award before the expiration of the time given to the arbitrators to make their award, such award will nevertheless be valid.<sup>9</sup> The umpire must be chosen by the arbitrators in the exercise of their judgment and at the same time;<sup>10</sup> and must not be determined by lot,<sup>11</sup> unless all the parties to the

<sup>1</sup> *Zachary v. Shepherd*, 2 Term Rep., 781; *Lowndes v. Lowndes*, 1 East, 276, overruling *Anderson v. Coxeter*, 1 Stra., 301; see 1 Wms. Saund., 327 d, n. (s).

<sup>2</sup> Stat. 9 & 10 Will. III., c. 15, s. 2; *Nichols v. Roe*, 3 Myl. & K., 431.

<sup>3</sup> *Lowndes v. Lowndes*, 1 East, 276; *ante*, p. 173.

<sup>4</sup> *Pedley v. Goddard*, 7 Term Rep., 73.

<sup>5</sup> *Lucas v. Wilson*, 2 Burr., 701.

<sup>6</sup> *Macarthur v. Campbell*, 5 B. & Ad., 518 (27 E. C. L.); *Smith v. Whitmore*, 1 Hem. & Mill, 576, affirmed 10 Jur. N. S., 1190.

<sup>7</sup> *Rawthorne v. Arnold*, 6 B. & C., 629 (13 E. C. L.); s. c., 9 D. & R., 556.

<sup>8</sup> *Smailes v. Wright*, 3 M. & Selw., 559; *Sprigens v. Nash*, 5 M. & Selw., 193.

<sup>9</sup> *Sprigens v. Nash*, *ubi sup.*

<sup>10</sup> *Re Lord*, Q. B., 1 Jur., N. S., 893; s. c., 5 E. & B., 404 (85 E. C. L.).

<sup>11</sup> *In re Cassell*, 9 B. & C., 624 (17 E. C. L.); *Ford v. Jones*, 3 B. & Ad., 248 (23

reference consent to his appointment by such means.<sup>1</sup> In order to enable him to form a proper decision, he ought to hear the whole evidence over again,<sup>2</sup> unless the parties should be satisfied with his deciding on the statement of the arbitrators.<sup>3</sup> And the whole matter in difference must be submitted to his decision, and not some particular points only on which the arbitrators may disagree.<sup>4</sup>

An award for the payment of money creates a debt from one party to the other, for which an action may be brought in any court of law,<sup>5</sup> and which will be sufficient to support a petition for adjudication of bankruptcy.<sup>6</sup> And where the reference is made by order of the Court of Chancery,<sup>7</sup> or where the award requires any act to be done which cannot be enforced by an action at law,<sup>8</sup> equity will decree a specific performance. The award of arbitrators or of an umpire, though indented and under hand and seal, is not a deed unless delivered as such.<sup>9</sup> The costs of the arbitration are to be paid by the losing party, if the award is silent upon that point.<sup>10</sup>

E. C. L.); *European, etc., Shipping Company v. Crosskey*, 8 C. B. N. S., 397 (98 E. C. L.). See, however, *Re Hopper*, Law Rep., 2 Q. B., 367; 8 B. & S., 100.

<sup>1</sup> *Re Jamieson*, 4 Ad. & E. 945 (31 E. C. L.).

<sup>2</sup> *Re Salkeld*, 12 Ad. & E., 767 (40 E. C. L.); *Re Hawley*, 2 DeG. & S., 33.

<sup>3</sup> *Hall v. Lawrence*, 4 Term Rep., 589.

<sup>4</sup> *Tollitt v. Saunders*, 9 Price, 612.

<sup>5</sup> 2 Wms. Saund., 62 a, n. (5).

<sup>6</sup> *Ex parte Lingard*, 1 Atk., 241.

<sup>7</sup> *Marquis of Ormond v. Kynnersley*, 2 Sim. & Stu., 15; *Wood v. Taunton*, 11 Beav., 449.

<sup>8</sup> *Hall v. Hardy*, 3 P. Wms., 190.

<sup>9</sup> *Brown v. Vawser*, 4 East, 584.

<sup>10</sup> *Woolson v. R. R. Co.*, 103 Mass., 580.

## PART III.

### OF INCORPOREAL PERSONAL PROPERTY.

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#### CHAPTER I.

##### OF PERSONAL ANNUITIES, STOCKS AND SHARES.

IN addition to goods and chattels in possession, which have always been personal property, and to debts which have long since been considered so, there exists in modern times several species of incorporeal personal property, to which we now propose to direct our attention. These species of property are certainly not *choses in possession*, neither yet are they like debts strictly *choses in action*, though often classed as such. In analogy, therefore, to the well-known division of real estate into corporeal and incorporeal, we have ventured to place these kinds of property together into a class to be denominated *incorporeal personal property*. A debt no doubt is also incorporeal, but it is still well characterized by its ancient name of a *chose in action*.

The first kind of incorporeal personal property which we shall mention is a *personal annuity*. This kind of property is not, indeed, of so modern an origin as some of those which we shall hereafter mention. It consists of an annual payment, not charged on real estate; but it may, nevertheless, be limited to the heirs, or the heirs of the body of the grantee. In former times it was doubted whether an annuity was not a mere *chose in action*, and, therefore, incapable of assignment;<sup>1</sup> but this objection has long been overruled. When limited to the heirs of the grantee, it will, on his intestacy, descend, like real estate, to his heir; but it is still personal property,<sup>2</sup> and will pass by his will under a bequest of all

<sup>1</sup> Co. Litt., 144 b, n. (1).

<sup>2</sup> Earl of Stafford v. Buckley, 3 Ves. Sr., 171; Radburn v. Jervis, 3 Beav., 450, 461.

his personal estate.<sup>1</sup> When given to the grantee and the heirs of his body, the grantee does not acquire an estate tail; for this kind of inheritance is not a *tenement* within the meaning of the statute *De Donis Conditionalibus*.<sup>2</sup> The grantee has merely a fee simple *conditional* on his having issue, such as a grantee of lands would have had under a similar grant prior to the statute *De Donis*,<sup>3</sup> or as a copyholder would now take in manors where there is no custom to entail.<sup>4</sup> When the grantee has issue, he may, therefore, alien the annuity in fee simple by a mere assignment; but should he die without issue the annuity will fail. A personal annuity given to a man *forever* will devolve on the executor, and not on the heir of the grantee.<sup>5</sup>

The next kind of incorporeal personal property to be considered is stock in the public funds, or bank annuities. Previously to the Revolution of 1688, there was no funded debt properly so called; although King Charles I. and King Charles II. both found occasion to raise money by the grant of annuities in fee simple chargeable on particular branches of the revenue. These annuities, not being payable out of real estate, appear to have been the first instances of personal annuities limited to the grantees and their heirs, and they gave occasion to those lawsuits by which the legal nature and incidents of personal annuities have been determined; although some mention of such annuities is certainly to be found in the old books.<sup>6</sup> Soon after the Revolution, however, a portion of the public debt was funded, or transferred into perpetual annuities, payable, by way of interest, on the capital advanced, which capital was to be repaid by the government in the manner agreed on. And from that time to the present the funded debt of the country has, by several acts of parliament, been greatly increased. Stock in the funds, therefore, is merely a right to receive certain annuities, by half-yearly dividends, as they become due,<sup>7</sup> subject to the right of

<sup>1</sup> Aubin v. Daly, 4 B. & Ald., 59 (6 E. C. L.).

<sup>2</sup> Turner v. Turner, 2 Amb., 776, 782; Earl of Stafford v. Buckley, *ubi sup.*

<sup>3</sup> See Williams' Real Property, 30, 36, 2d ed.; 32, 38, 3d & 4th eds.; 35, 41, 5th, 6th, 7th & 8th eds.; 6th Am. Ed., 34, 35 and 40, 41.

<sup>4</sup> *Ibid.*, 286, 2d ed.; 295, 3d ed., 299 4th ed.; 310, 5th ed.; 327, 6th ed.; 334, 7th ed.; 349, 8th ed.

<sup>5</sup> Taylor v. Martindale, 12 Sim., 158.      <sup>6</sup> Co. Litt., 144 b; Fitz. N. B., 152 a.

<sup>7</sup> Wildman v. Wildman, 7 Ves., 174, 177; Rawlings v. Jennings, 13 Ves., 38, 45. Dividend warrants may now be sent by post, stat. 32 & 33 Vict., c. 104.

government to redeem such annuities on payment of a stipulated sum, which sum is the nominal value of the stock. Thus, 100*l.* £3 per cent. Consolidated Bank Annuities is a right to receive 3*l.* per annum forever, subject to the right of government to redeem this annuity on payment of 100*l.* sterling. The actual value of 100*l.* £3 per cent. Consolidated Bank Annuities (or *Consols* as they are shortly termed) of course depends on the state of the stock market, being generally lower, though it has been higher, than the nominal price, which is called *par*.

The public funds are composed of several separate stocks, of which, however, by far the largest and most important are the consols. In this fund alone the court of chancery formerly invested all the money committed to its care belonging to the suitors in that court; and, as it is a rule of equity that whatever the court would certainly order to be done may be done without applying to the court, every trustee and executor was justified in investing in consols any money which he might have held in trust, without any express direction for that purpose.<sup>1</sup> But, should he have invested trust money upon any other security without express authority so to do, he would have been answerable to his *cestuis que trust* for the amount of the money so invested, should the security have failed; and it seems also that the *cestui que trust* had an option either to claim the money, or to have so much stock as the money, improperly invested, would have purchased at the time when the improper investment made.<sup>2</sup> But when the trustee was authorized by the terms of his trust to invest either in the funds or on real securities, it was decided, after much conflict of opinion, that the *cestui que trust* had no option to charge the defaulting trustee with any larger sum than the amount of the money lost, with interest at 4 per cent. For had the trustee chosen, as he might, to invest on real security, the *cestui que trust* would have gained nothing by the subsequent rise in the funds.<sup>3</sup>

The next kind of incorporeal personal property which we shall mention are shares in joint stock companies. Joint stock compa-

<sup>1</sup> *Howe v. Lord Dartmouth*, 7 Ves., 150; *Holland v. Hughes*, 16 Ves., 114; *Tebbs v. Carpenter*, 1 Mad., 306; *Norbury v. Norbury*, 4 Mad., 191.

<sup>2</sup> *Forest v. Elwes*, 4 Ves., 497; *Pride v. Fooks*, 2 Beav., 430; *Robinson v. Robinson*, Lords Justices, 1 De G., M. & G., 247.

<sup>3</sup> *Robinson v. Robinson*, *ubi sup.*, overruling *Watts v. Girdlestone*, 6 Beav., 188; *Ames v. Parkinson*, 7 Beav., 379, and *Onseley v. Anstruther*, 10 Beav., 456.



nies were formerly of two kinds, those which were incorporate, or made into *corporations*, and those which were not so.

Corporations are legal personages, always known by the same name, and preserving their identity through a perpetual succession of natural persons. They are either corporations *sole*, composed of only one person, such as a bishop, a parson, or the chamberlain of London ; or corporations *aggregate*, composed of many persons acting on all solemn occasions by the medium of their *common seal*,<sup>1</sup> and it is of such corporations that we are now about to speak. Such corporations may be created either by charter conferred by the queen's letters-patent, or by act of parliament.

In the United States corporations are created either by special charter, or under general incorporation acts in the several States. Special charters, *i.e.*, the grant of corporate powers to the particular corporation by special act of Congress, or of the State Legislature, are less frequent than formerly ; and, in some of the States, are now expressly prohibited by constitutional provisions, the ease with which important and frequently objectionable powers can, through the aid of skilled counsel, be concealed under specious and seemingly innocent phraseology in the drafts of such measures, rendering them dangerous, and the grant to a favored few of special rights and privileges not open to other citizens generally, being, moreover, regarded as erroneous in principle under the democratic theory of government prevailing here. The general acts of incorporation, which now exist in almost every State and Territory, provide for the self-incorporation of a given number of persons, organized for the prosecution of any one or more of certain mercantile, manufacturing, or other specified pursuits, upon their filing, with the Secretary of State or other prescribed officer, a certificate stating their purpose, the amount of their capital stock, the name of the proposed corporation, and such other facts as the particular statute may require ; or else, as in some of the States, authority is conferred upon courts to grant charters in designated cases. The requirements of the statutes in the various States, and the limitation of the purposes for which such bodies corporate may be thus formed, are so various, and are so frequently enlarged, modified or changed by new enactments, as to render unprofitable any attempt at a general

<sup>1</sup> See Bac. Abr., tit. Corporations ; 1 Black. Com., c. 18.

summary of their provisions. The statutes of the particular State, at the date of inquiry, are the only safe guide in such matters.

Interesting and important questions arise as to the legal effect, upon the question of corporate existence, of irregularities and defects in the proceedings where, as frequently happens, the requirements of these general incorporation acts are not strictly complied with by the persons seeking to become incorporated. Where the provision is that the corporation shall be created only upon strict compliance with the requirements of the statute, such requirements are mandatory, and any substantial defect or omission is fatal.<sup>1</sup> But where the omitted steps, although required of the individuals seeking to be incorporated, are not made prerequisites to the assumption of corporate powers, the requirements are regarded as directory simply, for the observance or non-observance of which the corporation is liable only to the government in a direct proceeding to forfeit its charter. If a law exists under which a corporation, with the powers assumed, proceeding regularly, might lawfully be created, and there has been a *bona fide* attempt to organize under it, followed by *user* of corporate rights thereunder, a corporation *de facto* results, the validity of which cannot be collaterally drawn in question, or contested by any other party than the State,<sup>2</sup> in actions arising either *ex contractu* or *ex delicto*.<sup>3</sup>

<sup>1</sup> Doyle v. Mizner, 42 Mich., 332; Mokelumne Hill Canal and Mining Co. v. Woodbury, 14 Cal., 424; s. c., with note, 73 Am. Dec., 658; Williams v. Franklin Township Association, 26 Ind., 310; Ferrara v. Vasconcelles, 23 Ill., 403.

<sup>2</sup> Mokelumne, etc., Co. v. Woodbury, *supra*; Methodist Church v. Pickett, 19 N. Y., 482; Heaston v. Cincinnati, etc., R. R. Co., 16 Ind., 275; s. c., with note, 79 Am. Dec., 430; Eaton v. Aspinwall, 19 N. Y., 119; Buffalo, etc., R. R. Co. v. Cary, 26 N. Y., 75; Mead v. Keeler, 24 Barb., 20; Holmes v. Gilliland, 41 Barb., 568; Gaines v. Bank of Mississippi, 12 Ark., 769; Fifth Baptist Church v. B. & P. R. R. Co., 5 Mackey, 269; Rice v. Rock Island, etc., R. R. Co., 21 Ill., 93; Tarbell v. Page, 24 Ill., 46; Caryl v. McElrath, 3 Sandf., 176; Searsburg Turnpike Co. v. Cutler, 6 Vt., 315; Persse Paper Works v. Willett, 1 Rob., 131; Thompson v. Candor, 60 Ill., 244; Cincinnati, etc., R. R. Co. v. Danville, etc., R. R. Co., 75 Ill., 113; Spring Valley Water Works v. San Francisco, 22 Cal., 434; Swartwout v. Michigan Air Line R. R. Co., 24 Mich., 389; Abbott's Trial Evidence, 24; S. & L., etc., R. R. Co. v. S. & C. R. R. Co., 45 Cal., 680; Davis v. Gray, 16 Wall., 222; Smith v. Sherley, 12 Wall., 361; Frost v. Frostburg Coal Co., 24 How., 278; Whitney v. Wyman, 101 U. S., 392.

<sup>3</sup> Fifth Baptist Church v. B. & P. R. R. Co., U. S. Supreme Court, October Term, 1890; Trustees v. Froislie, 37 Minn., 447; Society Perun v. Cleveland, 43 Ohio St., 481; North v. State, 107 Ind., 356.

The faculties and powers which characterize a corporation are, first, a distinctive, artificial name, by which it can make contracts; secondly, authority to sue and be sued, either in its own name or the name of its officers as representing the association; thirdly, an entity distinct from its members, enabling them to sue the association and to be sued by it; and, fourthly, a succession of membership, by transmission or transfer of shares. An organization possessed of these faculties and powers by statutory grant, even though the statute conferring them expressly provides that it shall not be held to be a corporation, is so, nevertheless, in any other country than that of its creation.<sup>1</sup>

Another benefit, and the most substantial, derived from incorporation is exemption from individual liability for debts incurred; perpetual succession, ability to sue and be sued, etc., being merely incidents of convenience which might be dispensed with.<sup>2</sup> This last and most important characteristic, however, is not indispensable,<sup>3</sup> a limited individual responsibility of shareholders for the debts of the association being a frequent provision of both special charters and general incorporation acts; and such responsibility in some cases is made as absolute as in cases of partnership.

Statutes of one State or country, of course, have no inherent extra-territorial effect; and, accordingly, corporations created by or under legislative enactment in one State have no inherent right to recognition as such elsewhere. Such a corporation can exercise none of the functions or privileges conferred by its charter in any other State, except by the comity or consent of the latter;<sup>4</sup> nor is it a "citizen" within the meaning of that clause of the Constitution of the United States which declares that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States.<sup>5</sup> That a corporation duly organized under the laws of any State is, however, authorized, by the general comity which, as a matter of law, obtains throughout the States and Territories of the United States, in the absence of positive enactments to the contrary, to exercise its powers and functions in other States, even to the extent of taking and holding in its own

<sup>1</sup> *Liverpool Insurance Co. v. Massachusetts*, 10 Wall., 566.

<sup>2</sup> *Hess v. Wertz*, 4 S. & R., 356, 366.

<sup>3</sup> *Liverpool Ins. Co. v. Massachusetts*, *supra*.

<sup>4</sup> *Paul v. Virginia*, 8 Wall., 168; *Liverpool Ins. Co. v. Massachusetts*, 10 Wall., 573.

<sup>5</sup> *Ibid.*

name real estate situated in any State or Territory, which, under its charter, it would be authorized to take and hold in the State of its domicile, is now well settled.<sup>1</sup>

Some effort has been made to exempt from the operation of the comity above referred to, two classes of cases, namely: First, where the charter of the corporation undertakes, either in express terms or by necessary implication, to confer upon it the power to hold lands in other States; and, secondly, where the power claimed is one which could not be obtained by incorporations under the laws existing in the State where the real property is located. As to the first of these classes of cases, it has been urged that no State can arrogate to itself a right of conferring upon its artificial creations powers to be exercised extra-territorially, in other States; while, as to the second class, it has been argued that the comity between the States does not require that any State should allow to foreign corporations the enjoyment of privileges not accorded to its own. Both of these objections, however, have been overruled by the supreme court of the United States, and, it is believed, by all the later decisions in the State courts.

In the case of *Cowell v. Colorado Springs Co.*,<sup>2</sup> both of the objections stated were presented. The charter had been obtained in Pennsylvania, authorizing the company to acquire and operate lands, provided such lands should be located in States and Territories lying west of the Mississippi river. The company acquired lands in Colorado, in which Territory not only was there an absence of any law under which the powers in question could have been obtained by any Colorado corporation, but the legislature, under the limitations imposed by an act of Congress, was without authority to confer such powers. It was accordingly argued that, "if a domestic corporation could not be created with such powers, for reasons of public policy, a foreign corporation could not, for like reasons, be permitted to exercise them in the Territory." But the Supreme court said: "The answer to this position is found in the general comity, which, in the absence of positive direction to the

<sup>1</sup> *Runyan v. Lessee of Coster*, 14 Pet., 122; *Cowell v. Col. Springs Co.*, 100 U. S., 55; *Christian Union v. Yount*, 101 U. S., 362; *Stevens v. Pratt*, 101 Ill., 206; *Hanna et al. v. Petroleum Oil Co.*, 23 Ohio St., 622; *Petroleum Oil Co. v. Weare*, 27 Ohio St., 343; *Bank v. Hall*, 35 Ohio St., 158; *contra*, see *Hill v. Beach*, 12 N. J. Eq., 31.

<sup>2</sup> *Supra*.

contrary, obtains through the States and Territories of the United States, by which corporations created in one State or Territory are permitted to carry on any lawful business in another State or Territory, and to acquire, hold and transfer property there, equally as individuals. If the policy of the State or Territory does not permit the business of the foreign corporation in its limits, or allow the corporation to acquire or hold real property, it must be expressed in some affirmative way; it cannot be inferred from the fact that its legislature has made no provision for the formation of similar corporations, or allows corporations to be formed only by general law. Telegraph companies did business in several States before their legislatures had created or authorized the creation of similar corporations; and numerous corporations existing by special charter in one State are now engaged, without question, in business in States where the creation of corporations by special enactment is forbidden."<sup>1</sup>

Joint stock companies which had not obtained letters-patent or special acts of incorporation were formerly subjected to very great inconvenience whenever they had occasion to take legal proceeding against any person who happened to be a shareholder. And every shareholder in such companies was subjected to the like inconvenience whenever he had occasion to proceed against the company. For such a company, however extensive, was in law merely a partnership; and a partner who owes money to the partnership of which he is a member, evidently owes a portion of it to himself according to his interest in the joint stock; and in like manner a partner who is a creditor claims part of his demand against himself. In each case, therefore, an account must be settled before the exact debt or credit of the partner can be ascertained.<sup>2</sup> In order to obviate the difficulties which thus arose, many joint stock companies obtained special acts of parliament, enabling them to sue and be sued in the name of some officer.

Three incidents in the law of ordinary partnership unite to render that relation inadequate for the conduct of operations or the consummation of objects requiring the combined capital, skill and labor of large numbers of persons, for considerable periods of time. The death of any one of the partners, or the marriage of any, if a female,

<sup>1</sup> See, also, cases of *Runyan v. Coster*; *Stevens v. Pratt*; *Petroleum Co. v. Wear* etc., *supra*.

<sup>2</sup> See *Richardson v. Bank of England*, 4 Myl. & Cr., 165.

dissolves the co-partnership; a sale or transfer of the interest of any partner has the like effect; and every partner possesses the power to bind the partnership, and all the partners personally, by all such acts and contracts within its scope as he may see fit to make, even against the express terms of the articles of the co-partnership, unless knowledge of those terms upon the part of the other party can be shown. To obviate these difficulties, large societies directed their efforts, and the ingenuity of the ablest legal advisers they could obtain, to procure for themselves a continuous existence, with transmissible and transferable stock, and without the right, upon the part of any associate, other than a committee or board of members chosen for the purpose, to bind the other associates, or the assets of the association; the outcome being what is known as Joint Stock Companies.<sup>1</sup>

A joint stock company, then, is the union of a number of persons under an agreement, not that they will enter into a co-partnership, but that the interests of the parties engaged in the enterprise shall be represented by transmissible and transferable shares of stock, the holders of which shares, whether the original adventurers, their personal representatives, or their transferees, shall be, and continue, an association together, conducting their operations solely through a board of directors or equivalent agency, and sharing their profits and losses together.<sup>2</sup>

Except in the particulars that they are not dissolved by the transfer of the interest of any of their number, or by the death of any, or by the marriage of female members, and that they are bound only by acts done on contracts made by or under the authority of the board of directors or managers, these associations are merely general partnerships.<sup>3</sup> No number of members short of the whole can, except in equity, sue or be sued;<sup>4</sup> nor can any member sue the association except in equity; while, on the other hand, each of its members is individually liable for all debts which it may contract,<sup>5</sup> even though it is one of the terms of the articles of association that they shall not be.<sup>6</sup> "It is important for the public to know that, if

<sup>1</sup> Baird's Case, L. R., 5 Ch. App. Cases, 725.

<sup>2</sup> *Ibid.*

<sup>3</sup> Clagett v. Kilbourne, 1 Black, 346.

<sup>4</sup> McMahon v. Rauhr, 47 N. Y., 67, 71.

<sup>5</sup> Headley v. County Commissioners, 105 Mass., 519, 526, and citations; Wells v. Gates, 18 Barb., 554.

<sup>6</sup> Hess et al v. Wertz, 4 S. & R., 356, 366; 3 Kent's Com., 26.

persons connect themselves with a company of this description, they are every one of them liable to pay the demands upon it.”<sup>1</sup> Thus, members of a union or co-operative store are liable as partners for debts contracted, within the scope of his employment, by the manager or agent,<sup>2</sup> even though the articles provided that no debts should be incurred;<sup>3</sup> the members of an unincorporated joint stock company are liable for the hire of a mechanic employed by agents, acting within the like scope, although the articles gave no authority to incur debts;<sup>4</sup> and subscribers to a common object, as the erecting of an academy building, who authorize one of their number to employ workmen, procure materials, and the like, are jointly liable for all debts so contracted by him.<sup>5</sup> It is immaterial whether the defendant has signed the articles of the company or not, or whether stock has ever issued or not; his subscription for shares, and his payment of an assessment thereon, are sufficient to constitute him a partner.<sup>6</sup> Even where such companies have been organized under State statutes which enact that they may be sued under the name of the president or treasurer; that judgment in such suits may be rendered against the company; and that, until execution thereunder is returned unsatisfied, no suit shall be maintained on the demand against the individual members—provisions which, under a decision of the Supreme Court of the United States above referred to,<sup>7</sup> are sufficient to constitute the company a corporation outside of its domicile, even though the statute creating it declares in terms that it should not be so held—it is held that they are, nevertheless, partnerships in States other than those of their creation, and the members liable to suit as partners.<sup>8</sup> It has been elsewhere held, however, in the case of similar provisions for suit against the company in the name of its officers, that such provisions are merely cumulative, and do not take away the right to sue the members as partners, even in the State of the domicile, if the

<sup>1</sup> *Frost v. Walker*, 60 Me., 468, and citations.

<sup>2</sup> *Davison v. Holden*, 55 Conn., 103.

<sup>3</sup> *Manning v. Gasharie*, 27 Ind., 399.

<sup>4</sup> *Bodwell v. Eastman*, 106 Mass., 525.

<sup>5</sup> *Robinson v. Robinson*, 10 Me., 240.

<sup>6</sup> *Boston & Albany R. R. v. Pearson*, 128 Mass., 445; *Frost v. Walker*, 60 Me., 468.

<sup>7</sup> *Liverpool Ins. Co. v. Massachusetts*, 10 Wall., 566.

<sup>8</sup> *Taft v. Ward*, 106 Mass., 518.

creditors so elect.<sup>1</sup> Where, under such statutes, suit is brought against the company under the name of one of its officers, the officer is to be regarded as a nominal party only, and execution against his individual property will not be ordered, to satisfy the judgment recovered in such suit.<sup>2</sup>

In the case of an ordinary partnership, newly-admitted members of the firm are, in general, individually liable only for debts contracted subsequently to their admission.<sup>3</sup> Under statutory provisions for the creation of joint stock companies, a transferee of shares therein is liable for its debts, as well those contracted before as those contracted after the transfer;<sup>4</sup> but, in the absence of any statute, this shifting of liability could not be attained by any arrangement between the parties themselves, or by anything short of a novation by consent of creditors, the ordinary partnership rule applying.<sup>5</sup>

In the like application of the rules of partnership, which do not extend the liability of all for the contracts of each to the case of non-trading partnerships, members of clubs, benevolent societies, and the like, are not liable for debts contracted by the managing committee, or board of directors, the officers of such bodies being held to have no authority to pledge the general credit of the members.<sup>6</sup> And where an unincorporated masonic lodge appointed a committee to erect a building, and expressly authorized it to borrow money for that purpose, it was held that only the members who voted for, or who afterwards assented to, the authority thus given, were liable for the moneys so borrowed.<sup>7</sup>

An ineffectual attempt to form a corporation under the general incorporation acts, failing through insufficient compliance with the requirements of the statute, will result, in legal effect, at least for some purposes, in a joint stock company, with the partnership incidents of that relation; and the rights of members of such a company to the property acquired by it will be recognized and pro-

<sup>1</sup> *Davison v. Holden*, 55 Conn., 103.

<sup>2</sup> *Harrison v. Timmins*, 4 M. & W., 510.

<sup>3</sup> *Story on Partnership*, s. 152, 153.

<sup>4</sup> *Cape's Executor's Case*, 2 DeG., M. & G., 562.

<sup>5</sup> *Smith v. Anderson*, 15 Ch. Div., 247, 274; *Thomas v. Clark*, 18 C. B., 662.

<sup>6</sup> *Re St. James Club*, 16 Jur., 1076; *Fleming v. Hector*, 2 M. & W., 171; *La Fond v. Deems*, 81 N. Y., 507, 514.

<sup>7</sup> *Ash v. Guie*, 97 Pa. St., 493; s. c., 39 Am. Rep., 818.



tected accordingly.<sup>1</sup> And, though the corporation be regularly formed, yet if the corporators conduct, not the business contemplated by the statute or charter, but a wholly different one, though in the corporate name, they are liable as partners.<sup>2</sup> Whether such an ineffectual attempt will render individually liable for debts as partners stockholders who were ignorant of the defects in the proceedings, and who, therefore, in fact intended that the managers or agents should represent a corporate body, and not themselves as individuals,<sup>3</sup> is a question upon which there is considerable diversity in the decisions, the weight of authority, however, inclining perhaps to the negative, under such circumstances.<sup>4</sup>

Where, as in our American States, the more beneficial and convenient agencies of bodies corporate are easily and inexpensively attainable, intentional joint stock companies are of comparatively rare creation. There are classes of business, however, to which they are adapted, and for which corporations cannot be utilized. In the case of building associations, for example, if the associations were incorporated, and thus constituted a legal entity distinct from the members composing it, advances by them to their members would constitute loans, to which, in some of the contingencies incident to their methods of conducting business, the usury laws would be an obstacle. In some of the States, statutes have been passed exempting such associations from the operation of the usury laws; but, in jurisdictions in which there are no such statutes, they become unincorporated joint stock companies, mere partnerships, having no existence independently of their members, in which cases advances are regarded, not as loans, but merely as dealings with a common partnership fund, in which the parties receiving them have an interest in common with the other members of the society.<sup>5</sup> So, also, such companies are still useful for the prosecution of enterprises not provided for in the general incorporation acts, and for which special charters, for any reason, are not to be obtained.

Shares in joint stock companies and corporation stock, being

<sup>1</sup> Whipple v. Parker, 29 Mich., 369; Conner v. Abbott, 35 Ark., 365; and see Holbrook v. St. Paul, etc., Ins. Co., 25 Minn., 229.

<sup>2</sup> Ridenour v. Mayo, 40 Ohio St., 9.

<sup>3</sup> Stafford Nat'l Bank v. Palmer, 47 Conn., 443, 448; Central City Savings Bank v. Walker, 66 N. Y., 427; Fay v. Noble, 7 Cush., 188.

<sup>4</sup> For the authorities, pro and con, see Bates on Partnership, s. 4, 5.

<sup>5</sup> See Endlich on Building Associations, s. 338, *et seq.*

choses in action and not corporeal, movable property,<sup>1</sup> are held, in England, not to be within the seventeenth section of the Statute of Frauds.<sup>2</sup> The tendency of the American courts is to give a broader scope to the statute, including under the prohibition contained in the section in question, sales of nearly every species of personal property,<sup>3</sup> except patents.<sup>4</sup>

<sup>1</sup> Benjamin on Sales, s. 111.

<sup>2</sup> Pickering v. Appleby, 1 Com., 354; Colt v. Netterville, 2 P. Wms., 304, 308; Pawle v. Gunn, 4 Bing., N. C., 445 (33 E. C. L.); Humble v. Mitchell, 11 A. & E., 205 (39 E. C. L.); Heseltine v. Siggers, 1 Exch., 856; Tempest v. Kilner, 3 C. B., 249 (54 E. C. L.); Bowlby v. Bell, *Ibid.*, 284; Powell v. Jessop, 18 C. B., 336.

<sup>3</sup> Benj. on Sales, *supra*, note; Colvin v. Williams, 3 H. & J., 38; Tisdale v. Harris, 20 Pick., and note; Boardman v. Cutler, 128 Mass., 388; Gooch v. Holmes, 41 Me., 523; but see Browne on Stat. of Frauds, s. 296-298.

<sup>4</sup> Somerby v. Buntin, 118 Mass., 279.

## CHAPTER II.

### OF PATENTS, TRADE-MARKS, PRINTS AND LABELS, AND COPYRIGHT.

CERTAIN rights to inventions conferred by proper authority, by letters-patent, and called, briefly, *Patents*, as also certain rights to distinguishing marks, or designations, in trade, called Trade-Marks, and certain rights of authors, called Copyright, fall under the head of personal property and are incorporeal personal property.

The exclusive use of an invention by the inventor, or by any one is not a natural right.<sup>1</sup> One of the natural rights of man is that he shall have equal right with his fellow-men to protection and benefit. If, for example, in primitive life, one man invents an implement, as of defence, there can be no principle or natural right in him, which will prohibit another, on seeing the new implement and recognizing its benefits, from making and using one like it. The act deprives the inventor of nothing, does not lessen his protection, and does him no injury. Should the other not have the right to make and use the new implement, he would be less protected, and this without good to the inventor. It is quite generally believed that an inventor has a natural right to the exclusive use of his invention, and that the patent statute is but in recognition of this natural right; and it is commonly argued that as the inventor confers a benefit on his neighbor by giving him knowledge of his invention, therefore the neighbor is by natural gratitude bound to make return therefor; but this position is not so strong as the one that the inventor is bound, by natural justice, to allow the other an equal chance with himself of protection, when doing so brings no harm to himself. An inventor has no right of property in his invention originally. There is no absolute or natural right that one person being the first inventor to-day, shall

<sup>1</sup> *Traité des Brevets d'Invention*, par C. Renouard; *Phillips on Patents*.  
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prevent another and everybody else from inventing and using the same thing hereafter.<sup>1</sup>

A patent of invention is not a common law right. The right is a creation by statute.

The prerogative to grant sole use of an invention is, in England, however, evidently derived from the common law itself and not from any statute.<sup>2</sup> In the United States it is derived from the Federal Constitution.

As remarked in a well-known treatise on patents,<sup>3</sup> writers on the law of patents often introduce their discussions of this branch of the law by tracing the history of monopolies in the law of England, although the course is believed to be misleading, as tending to inculcate incorrect conceptions of the legal nature of a patent privilege by classifying it with monopolies.

The patent system of the United States is, however, in a measure, as shown in a terse and concise treatise on patents, much used at the present day,<sup>4</sup> the offspring of the pre-existing system of Great Britain, which, though it arose, not from positive enactment, but from a negative provision,<sup>5</sup> it may be well to consider, if the student will never lose sight of two facts: first, that patents are never to be regarded as mere exceptions among monopolies; and, second, that the patent system of the United States rests upon a positive provision.<sup>6</sup>

Reference is generally made to a proviso in the Statute of Monopolies<sup>7</sup> upon which the English patent system has rested. This act was passed in 1623,<sup>8</sup> in pursuance of the decision in the

<sup>1</sup> *Am. H. & L. S. & D. Co. v. Am. Tool & Machine Co.*, 4 *Fisher's Patent Cases*, 294.

<sup>2</sup> Hindmarch on the Law of Patents, c. 11, 7; but see Macaulay's History of England.

<sup>3</sup> A Treatise on the Law of Patents for Useful Inventions, by George Ticknor Curtis. Preliminary Observations.

<sup>4</sup> A Summary of the Law of Patents for Useful Inventions, with forms, by William Edgar Simonds.

<sup>5</sup> Statute of Monopolies, 21 Jac. 1, c. 3, s. 6; and for instructive discussions on the influence of the act on the English and American Law of Patents, see Curtis on Patents, 1, 4; *McKeever v. United States*, 14 Ct. of Cl., 396; xxxiii., O. G.; *Op. Bradley, J.*; 111, U. S., 761.

<sup>6</sup> Art. 1, Sec. 8, Constitution of the United States.

<sup>7</sup> 21 Jac. 1, c. 3, s. 6.

<sup>8</sup> The normal date of the statute, according to 7 Pick, Stat., Art. 1, 255, was 1623. The actual date of the royal approval was March 24, 1624. *Dav., P. C.*, 3.

great case of monopolies in 1602,<sup>1</sup> and that in the Clothworkers of Ipswich Case, in 1615.<sup>2</sup>

The origin of the act, briefly stated, is that, in olden times, in England, exclusive rights to manufacture or trade were freely granted by the Crown as mere means of raising a revenue from the license fees exacted. The exercise of this power was first believed to be beneficial, because ingenious workmen were from time to time drawn to England by the expectation of substantial commercial advantages being secured to them by royal letters-patent; these being, really, grants of monopoly; and enterprising Englishmen were also induced, by the like expectation, to travel abroad and acquire a practical knowledge of trades and arts. But the Crown experienced in those days the evils of an absence of regular taxation—the chief of which was a perpetually recurring want of money to conduct the affairs of the government—the prerogative was exposed to, and its exercise soon became affected with many abuses, principally of this nature: that the monopoly was sold to the highest bidder, whether or not he was the true and first inventor, and later, without any regard at all to his capacity as an inventor or manufacturer; frequently, indeed, to courtiers, who made it a means of gain exclusively and did not assist the national industry at all. But oppressive as it became, the prerogative was freely exercised down to the accession of the Stuarts and was carried to a very oppressive and injurious extent during the reign of Elizabeth. The validity of the grants was at length contested in the courts, which adjudged them to be mischievous to the public.

The case of *Darcy v. Allein*, *supra*, 44th Elizabeth, tr. term, 1602, arose upon a royal grant of an exclusive privilege to manufacture playing-cards within the realm, or to import and sell such cards. It is quite clear from the declaration that it was recognized that to make such a grant defensible at all, it must appear that some measure of benefit flowed to the people in return for the

<sup>1</sup> *Darcy v. Allein*, 11 Coke, 84 b. Abridged 1, Brodix Patent Cases, 1. See also *Darcy v. Allen*, F. Moore, 671; 1 Carp., P. C., 26; *Darcy v. Allin*, 1 Webster's P. C., 1; *Ibid.*, 5; an argument of counsel is given, Noy, 173. For the Statute of Monopolies, and comments on its connection with the case of *Darcy v. Allein*, see 1 Abb. Pat. Laws, 215.

<sup>2</sup> Godbolt, 252. Abridged, 1 Brod. P. C., 6. See also *Tailors of Ipswich v. Sherring*, 1 Rolle, 4.

same; that there was a consideration, and that the grant was not of something old enough to have become a public right; for the declaration, in defining the grant by letters-patent to the plaintiff, alleged to have been violated by the defendant, sets up the pretence that the grant was made by Queen Elizabeth, with intendment or motive, that her subjects, being men able to exercise husbandry, should apply themselves thereto and not employ themselves in making playing-cards, *which had not been any ancient occupation within the realm* (a faint plea at novelty), that card-playing might be restrained, and that her subjects might apply themselves to more necessary and lawful trades.

The case was argued upon two general questions raised upon the two distinct grants in the patent: first, whether the grant of the exclusive right of making playing-cards within the realm was good; and, second, whether the grant of the sole license to import them was available.

As to the first question, it was held by the Chief Justice (Popham), and the whole court, that the grant was void for two reasons: first, because for a monopoly and so against the common law; second, because against some acts of parliament.

It was adjudged against the common law on four grounds, as follows:

1. That all trades, mechanical as well as others, which prevent idleness, and exercise men and youth in labor, are profitable for the Commonwealth, and therefore the grant to the plaintiff, to have the sole making, is against the common law and the benefit and liberty of the subject, as adjudged in that court in *Davenant v. Hurdis*.<sup>1</sup>

2. That the sole trade of any mechanical artifice, or any monopoly, is not only a damage and prejudice to those who exercise the same trade, but also to all other subjects, for the end of all these monopolies is for the private gain of the patentees, wherefore there are three inseparable incidents to every monopoly against the commonwealth; that the price will be raised, for he who has the sole selling of any commodity will make the price as he pleases; that after the monopoly granted, the commodity is not so good as before, for the patentee, having the sole trade, regards only his private benefit; and that it tends to the impoverishment of divers artificers and others, who, before, by the labor of their hands in their art or

<sup>1</sup> Tr. T., 4 Eliz. Rot., 92.

trade, had maintained themselves and their families, who will now of necessity be compelled to live in idleness.

And the common law on this point agrees with the equity of the Mosaic law, as appears in Deut. 24; 6, and with the civil law.

3. That the Queen was deceived in her grant; for the Queen, as by preamble appears, intended it to be for the public weal, whereas, it will be employed for the private gain of the patentee, to the prejudice of the weal public. Moreover, the Queen meant that the abuse should be taken away, which shall never be by this patent, but rather the abuse will be increased for the private benefit of the patentee; and, therefore, as it is said in the Earl of Kent's case, this grant is void *jure regio*.

4. That this grant is *primæ impressionis* and a dangerous innovation without authority of law or reason. And as to the playing at cards being a vanity, this is true, if it be abused; but the making of playing-cards is neither a vanity nor a pleasure, but labor and pains.

Wherefore it was declared that the Queen could not suppress the making of playing-cards within the realm.

Such a charter of a monopoly against the freedom of trade and traffic, was adjudged against divers Acts of Parliament, as 9 Edw. III., c. 1 and 2, which, for the advancement of the freedom of trade and traffic, extends to all things vendible, notwithstanding any charter or franchise granted to the contrary, or usage or custom, or judgment given upon such charters, which charters are adjudged by the same Parliament to be of no force or effect.

As to the second question, it was held that the license to have the sole importation and merchandising of cards, without any limitation or stint, notwithstanding the Act of 2 Edw. IV., is utterly against law; and it is recited that Edward III., by his letters-patent, granted to one John Pechey the sole importation of sweet wine into London; but at a Parliament held 50th Edw. III., this grant was adjudged void.

The Clothworkers of Ipswich Case, arose upon a grant by the King to the plaintiffs, of a charter by which no person might exercise the art or trade of a clothworker or tailor within the town, unless he had first served an apprenticeship, and it was adjudged that the Crown has not the general power to grant to a corporation a monopoly of a particular trade, *but if a man has made a discovery or brought a new trade within the kingdom, the Crown, in recompense of his expenditure, may grant him an exclusive right therein*

*for a limited time* ; thus pointing to the common law for derivation of the prerogative of the Crown of England for grant of patents of invention.

Confirmation by Parliament, however, of any grant of the Crown would make it good.

The abrogation of the practice of making these grants by the Crown was, from about 1602, agitated in Parliament ; and at length, in 1623, the Statute 21 Jac. 1, c. 3, the portions of which material to the law of patents are given below, was enacted, receiving the royal assent, March 24th, 1624.

In introducing discussions of the patent law, it is usually recited, that a patent is the name generally given to a grant from the Crown by letters-patent, of the exclusive privilege of making, using, exercising and vending some new invention ; that the granting of such letters-patent is an ancient privilege of the Crown ; that, in the reign of Queen Elizabeth, this privilege was stretched beyond its due limits, and the monopolies, thus created, formed one of the grievances which King James, her successor, was at last obliged to remedy ; that, accordingly, by the Statute of Monopolies, it was declared and enacted that all such monopolies were contrary to the laws of the Realm, and so were and should be utterly void and of none effect, and in no wise put in use or execution ; that in the Statute of Monopolies, however, there are certain exceptions, and particularly one on which this modern law with respect to patents may be said to be founded ; that this exception (Sec. 6.), is as follows :

“ Provided also and be it declared and enacted, that any declaration before mentioned shall not extend to any letters-patent and grants of privilege for the term of *fourteen years* or under, hereafter to be made, of the sole making or working of any manner of new manufactures within this Realm, to the true and first inventor or inventors of such manufacturers, which others, at the time of making such letters-patent, shall not use, so also they be not contrary to law or mischievous to the State, by raising prices of commodities at home, or hurt to trade, or generally inconvenient ; the said fourteen years to be accounted from the date of the first letters-patent or grant of such privilege hereafter to be made ; but that the same shall be of such force as they should be, if this act had never been made, and of none other.”

And it is pointed out that the granting of letters-patent is not ex-



pressly warranted by this statute which merely reserves to such letters-patent as fall within the terms of this exception such force as they should have had if this act had never been made, and none other force; that, by modern act of parliament, a prolongation of the term, granted by the original letters-patent, may be granted, either to the original grantee or to his assignee, for a term not exceeding *seven years* after the expiration of the first term, in case the Judicial Committee of the Privy Council shall, upon proper application, report to her Majesty, that such further extension of the term should be granted, and if such further period of seven years can be shown to be insufficient for the reimbursement and remuneration of the expense and labor incurred in perfecting the invention, then by a subsequent statute, the crown may grant to the inventor, or his assignee, an extension of the patent for any time not exceeding *fourteen years*; that the English system of patents for inventions has grown up under the construction given to the term "manufactures"; and, it is remarked, that the term "manufactures" is used in the statute in a literal and also a figurative sense, and covers anything which can be produced or performed by the hand of man, "manufacture" having been defined to be "something made by the hand of man,"<sup>1</sup> and held also to include the practice of making a thing or producing a result;<sup>2</sup> that as the term itself, as well as the purpose of the statute, evidently contemplated something to be done or produced in matter, as distinguished from philosophical or abstract principle, and the subjects of patents which could lawfully be granted were to be "new manufactures," or "the working or making of new manufactures," invented by the grantee, and which "others" at the same time of the grant did not use, it is apparent that something of a corporeal nature, something to be made, or the making of something, or the producing of some effect or result in matter, or the practical employment of art or skill, must constitute the subjects of the exclusive privileges which the Crown was authorized to grant, and not mere abstract ideas, plans, or theoretical conceptions;<sup>3</sup> and it may be noted that the expression "new" means never before practiced or publicly known within the Realm; that the term

<sup>1</sup> Per Lord Kenyon in *Hornblower v. Boulton*, 8 T. R., 99.

<sup>2</sup> Per Eyre, C. J., in *Boulton v. Bull*, 2 H. Bl., 492.

<sup>3</sup> See Comments on the Statute, in *The King v. Wheeler*, 2 B. & Ard., 349, 350.

"realm" now means Great Britain and Ireland and the Isle of Man, to the exclusion of the Colonies, which, at the present day, nearly all have patent systems and laws of their own,—prior to 1852 the British letters-patent extending to all British colonies, or plantations, named in the patent, or being extensible to any one or more of the colonies or plantations, but the act of 1852 having restricted the rights thereunder to Great Britain, Ireland, the Channel Islands, and the Isle of Man, soon after which the colonies began to enact patent-laws of their own, and the act of 1883 having restricted the rights obtainable under British Patents to Great Britain, Ireland and the Isle of Man, in which respect it is not changed by the act of 1885,—and that the expression "true and first inventor and inventors" has been held to include the first to introduce the invention into the Realm and to apply for a patent before the invention was publicly known.

But a patent for a useful invention is not, under our law, nor under the law of England, a grant of monopoly, in the sense of the old common law, that is, in the prohibited sense, and what has been defined by Sir Edward Coke<sup>1</sup> to be a grant which restrains others from the exercise of a right of liberty which they had before the grant was made; and the patent system of the United States has no derivation, direct or indirect, from the Statute of Monopolies, any more than it has from the considerations which caused the enactment of that Statute.

The patent system of the United States is based upon Article I. of the federal Constitution, has grown up under a positive grant of authority therein, and is to be considered, in respect to the subjects of exclusive privileges with reference to that grant and to the legislation which has been had under it.

Article I., Section 8, of the Constitution of the United States confers upon Congress power "to promote the progress of science and useful arts by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries."

It will thus be seen that our forefathers, at the very beginning of the structure upon which is founded one of the greatest nations of the earth, the influence of whose institutions and the character

<sup>1</sup> 13 Inst., 191, c. 85.

of whose people are felt with beneficial effect throughout the world, with a wisdom most admirable and a forethought which seems prophetic, secured, by encouragement of the inventor, the great engine of progress—*Invention*—recognizing the importance of securing to the inventor, by positive grant, and original property in his invention, which, without protection, would have rested only upon a principle of natural justice, and by the manner of justice prescribed, supplied an incentive for meditation and experiment toward new and useful creations, with disclosure of the important secret which might have remained hidden in the breast of the inventor, and at once conveyed to society the benefit resulting from invention, in the progressive, enlightening and expansively-civilizing influence thereof. Lord Bacon, *Novum Organum*, Book 1, Section cxxix., gave strong expression to the obligation of mankind to the inventor. The reason for enacting patent statutes is clearly stated in the fundamental law.<sup>1</sup>

Taking its rise, then, in the federal Constitution, the patent system of the United States has gradually developed into a great and beneficent institution, which, by its manner of encouraging and promoting progress in the useful arts, has done much to place this country in the highest rank of development, and has brought it to the lead in inventive progress. An enlightened patent system brings facilities in the affairs of life. It is, perhaps, not too much to say that there is not a comfort or convenience which we enjoy at this day, and to which our grandparents were strangers, that is not the direct result of the proper protection under patents; and there has been no more potent factor in the magnificent, substantial and unrivaled prosperity of our country than its wise patent laws, and their proper and judicious construction by the courts. It has been officially stated, that patents form the basis of at least two-thirds of the manufactures of the Nation.<sup>2</sup>

In a treatise on the law of patents,<sup>3</sup> before referred to, it is stated that it might be supposed that the advance in prosperity due to inventions would be confined to the patent owners, during the life of the patent; but that such is not the case, since the general public is benefited, while the patent is in force, even more than the patent-

<sup>1</sup> *Day v. Union Rubber Co.*, 3 Blatchford 500; *Kendall v. Winsor*, 21 Howard, 322.

<sup>2</sup> Report of Commissioner of Patents.

<sup>3</sup> Simonds on Patents, p. 8.

owner, in the establishment of new industries, with presentation of new, useful and beneficial things, and in the great reduction in cost of some products, for example, carpets, which is shown to be due to labor-saving machinery, while it is also shown that by the introduction and use of the machinery the employment of individuals is greatly increased.

The patent system promotes the progress of useful arts in different ways; for example, by stimulating persons, by prospect of pecuniary gain, to sustained effort toward the production of useful inventions; by protecting the investment of capital in the development and working of a new invention, until the investment becomes remunerative;<sup>1</sup> and by accustoming large numbers of persons to the use of procedures and mechanism requiring more than ordinary intelligence, thus educating them and also causing them to acquire skill and dexterity.

The patent system of the United States, or what is known as the "American System," has attracted general attention, so that other nations have followed the same. This is particularly noticeable in the case of the German Empire, the patent law of which is framed upon ours. Indeed, when a new patent law for Germany was under contemplation, the present writer was requested by the German Government to supply copies of the patent law of the United States and of the rules of practice of the Patent Office, with comments.

Every civilized and enlightened country on earth has now a patent system, excepting Holland, the clear and immediate cause of the exception of which may reside in the reported reason given by a Dutch legislator, to the effect that patents might be serviceable in such countries as the United States and England, but were useless in a country which had reached such a state of perfection as Holland.

The first patent law of the United States was approved April 10, 1790,<sup>2</sup> and, though it has been changed from time to time and enlarged, there has been no real departure from the system as originally founded.

As already shown, British patents for invention were, during our colonial existence, sometimes extended to have effect in these

<sup>1</sup> Report Committee on Patents, 1863, Vol. I.

<sup>2</sup> Act of 1790, Chapter 7, 1 Statutes at Large, 109.

colonies. The colony of Connecticut had what was virtually a patent law, and Massachusetts Bay also granted patent protection.

After the Declaration of Independence, but before the adoption of the Constitution, several of the States exercised the right of granting patents.

The Act of 1790 prescribed petition to the Secretary of State, the Secretary of War, and the Attorney-General, setting forth that the applicant has *invented or discovered, some new and useful art, manufacture, engine, machine, or device, or improvement thereon, not before known or used*, and praying that a patent would be granted therefor, whereupon the three officials, or any two of them, if they deemed the invention or discovery sufficiently *useful and important*, might cause letters-patent to be made out in the name of the United States, to bear teste by the President, reciting the allegations and suggestions of the petition and describing the invention or discovery *clearly, truly and fully*, and, thereupon, granting to the *petitioner or petitioners, his, her or their heirs, administrators, or assigns*, for any term not exceeding *fourteen years*, the *sole and exclusive right and liberty of making, constructing and using, and vending* to others to be used, the said invention or discovery, which letters-patent should be delivered to the Attorney-General to be examined, who should thereupon, within fifteen days after the delivery to him, if he should find the same conformable to this Act, certify it so to be at the foot thereof, and present the letters-patent so certified to the President, who should cause the seal of the United States to be thereto affixed; The patent afterwards to be recorded in the Office of the Secretary of State, delivered to the patentee *or his agent*, and the delivery thereof entered on the record and indorsed on the patent by the Secretary, at the time of granting; the grantee at the time of the granting to deliver to the Secretary of State a specification in writing which should be accompanied by drawings and models, if the nature of the case allowed of representation by model, the specification so particular and the model so exact as not only to *distinguish* the invention or discovery from other things before known and used, but also to *enable any persons skilled in the art or manufacture* whereof it is a branch or wherewith it might be nearest connected, *to make, construct, or use the same*, the specification to be filed in the office of the Secretary, and certified copies to be competent in evidence. It was made the duty of the Secretary of State upon appli-

cation of any person for a copy of specification, to give this, and upon request for a similar model to let the same be made by or at the expense of the person applying. Penalty for the violation of a patent was payment to the owner of such damages as should be assessed by a jury, and forfeiture of the patented thing or things constructed, used, or vended, recovery to be had in an action on the case. Upon oath or information before the judge of the district court where the defendant resided that any patent was obtained surreptitiously, by or upon false suggestion, and motion made to the said court within one year after issuing the patent, but not afterwards, it was made lawful for the judge, if the matter appeared sufficient, to grant a rule on the owner of the patent to show cause why a process should not issue against him to repeal the patent; and, if sufficient cause were not shown to the contrary, the rule would be made absolute, and thereupon the judge should order process to issue; if no sufficient cause were shown to the contrary, and it should appear that the patentee was not the first inventor or discoverer, judgment would be rendered by the court for the repeal of the patent; if the party at whose complaint the process issued, should have judgment given against him, he should pay all such costs as the defendant had been put to in defending the suit, the cost to be taxed by the court, and recovered as costs expended by the defendant are recovered, in due course of law. In all actions brought by owners for any penalty incurred by virtue of the Act, the patents or specifications were made *prima facie* evidence that the patentee was the first and true inventor, but, nevertheless, the defendant might plead the general issue, due notice in writing having been given to the plaintiff thirty days before the trial, and file testimony tending to show that the specification filed by the plaintiff did not contain the whole truth concerning his invention, or that it contained more than is necessary to produce the effect described, and if the concealment of part, or the addition of more than is necessary should appear to have been intended to mislead, or should actually mislead the public, then in such cases the verdict and judgment should be for the defendant.

The act of 1790 was repealed and supplanted by a new act approved February 21, 1793,<sup>1</sup> differing from the old in limiting

<sup>1</sup> Act of 1793, Chapter 11, 1 Statutes at Large, 318.

patent-privilege to citizens of the United States, designating patentable subject-matter by expressions ever since employed, as *art, machine, manufacture, or composition of matter*, or an improvement therein, and such not to have been known or used before the *application*, prescribing petition to the Secretary of State only, forbidding an improver from taking liberty of the original, and the owner of the original from taking liberty of the improvement, and declaring that simple changes of proportion or form in any composition of matter or machine, in any degree, should not be deemed a discovery; prescribing an oath to an application, namely, that every inventor, before receiving a patent, must swear or affirm that he believes himself to be the true and first inventor or discoverer of the art, machine or improvement for which he solicits a patent, and deliver a written description of his invention, and of the manner of using, or process of compounding the same, in such full, clear, and exact terms, as to distinguish the same from all other things before known, and to enable any person skilled in the art or science of which it is a branch, or with which it is most nearly connected, to make, compound, and use the same; prescribing that in the case of a machine, he shall fully explain the principle and the several modes in which he contemplates using the principle, by which it may be distinguished from other inventions, that he shall accompany the whole with drawings and written references, where the nature of the case admits of drawings, or with specimens of the ingredients, and of the composition of matter, where the invention is a composition of matter; and that the description shall be signed by the inventor, attested by two witnesses, and filed in the office of the Secretary of the State, and certified copies thereof to be competent evidence; in a machine application, a model to be furnished if required; furthermore, legalizing assignment of title and interest in an invention, providing for record of the assignments, and giving status to the assignee; fixing the penalty of making, using or vending the thing protected by patent, without consent of owner first obtained in writing, at a sum equal to at least three times the price for which the patentee has usually sold or licensed to others the use of his invention, recovery to be had in an action on the case in any court having competent jurisdiction; providing that, in such action, the defendant might plead the general issue, and give this act, and any special matter of which written notice had been given the plaintiff,

thirty days before trial, in evidence, to prove that the plaintiff's specification, with intent to deceive the public, contains less or more than the whole truth, or plead want of novelty anterior to the invention of the patentee, or surreptitious obtainment of the patent for the discovery of another; permitting the merger of any existing State grant of exclusive right to an invention into a national grant canceling the State grant; providing for continuance of previous applications, upon compliance with conditions of this act and paying fees herein required; providing that in case of interfering applications, the same be submitted to the arbitration of three persons, one chosen by each of the applicants, and the third appointed by the Secretary of State, the decision, delivered to the Secretary of State in writing and subscribed by the arbitrators, to be final as respects the granting of the patent; either of the applicants failing to choose an arbitrator, the patent to issue to the opposite party; where there were more than two interfering applications, and the parties applying should not all unite in appointing three arbitrators, the Secretary of State to appoint the arbitrators; furthermore, enlarging the time to three years, in which motion might be made, as in the previous act, to repeal a patent; and, finally, fixing the application fee for a patent at thirty dollars covering all services, the fee for copies of papers, respecting any patent, at twenty cents per hundred words, and for every copy of a drawing, at two dollars. The fees were: for receiving and filing the petition, fifty cents; for filing the specification, per copy sheet containing a hundred words, ten cents; for making out the patent, two dollars; for affixing the great seal, one dollar; and for indorsing the day of delivering the patent, including all intermediate services, twenty cents.

The act of 1793 was supplemented by an act, approved June 7, 1794,<sup>1</sup> restoring, at the instance of the plaintiff or defendant, within one year after the passage of the act, any proceeding theretofore had, in any district court of the United States, under the act of 1790, which might have been set aside, suspended or abandoned by reason of the repeal of the said act, providing that, after continuance, before any further order or proceeding should be had, the party against whom the suit was reinstated should be brought into court by a summons, attachment, or other proceeding used for compelling appearance.

<sup>1</sup> Act of 1794, c. 58, 1 Statutes at Large, 393.



The act of 1793 was further supplemented by an act, approved April 17, 1800,<sup>1</sup> extending the privilege of obtaining patents to aliens who, at the time of petitioning for a patent, had resided for two years within the United States, and providing that every person petitioning for a patent, should make proper oath or affirmation that the alleged invention, art, or discovery had not, to the best knowledge, or belief of the applicant, been known or used in this or any foreign country, if it should subsequently appear that the same had been known or used previous to the application, the patent to be void; also extending the right of application for and obtainment of a patent to the legal representatives of the inventor, in case of his death, in trust for the heirs-at-law of the deceased, if he shall have died intestate; but otherwise for his devisees, modifying the form of oath or affirmation accordingly; and changing the penalty for violating the rights of a patentee to a sum equal to three times the actual damage sustained by the owner.

The act of 1793 was further supplemented by an act, approved February 15, 1819,<sup>2</sup> giving the U. S. circuit courts original cognizance in equity, as well as at law, of all cases arising under the law granting exclusive rights to authors and inventors with authority to grant injunctions in equity, and providing that from the judgment or decree of such court in a patent case, writ of error or appeal shall lie to the Supreme Court, in same manner and under same circumstances as in other judgments and decrees of such circuit courts.

The act of 1793 was further supplemented by an act, approved July 3, 1832,<sup>3</sup> making it the duty of the Secretary of State annually to report to Congress, in January, and to publish in two newspapers of Washington, a list of all patents which had expired within the year immediately preceding; providing that application to Congress for extension of a patent should be made before its expiration, and notified at least once a month, for three months before its presentation, in two newspapers of Washington and one of the newspapers in which the laws of the United States were published in the State or Territory in which the patentee reside; the petition, under oath, to set forth particularly the grounds of the application;

<sup>1</sup> Act of 1800, c. 25, 2 Statutes at Large, 37.

<sup>2</sup> Act of 1819, c. 19, 2 Statutes at Large, 481.

<sup>3</sup> Act of July 3, 1832, c. 162, 4 Statutes at Large, 559.

evidence in its support to be taken before a judge or justice of the peace; the petition to be accompanied by a statement of the ascertained value of the invention and of the receipts and expenditures of the patentee therein; and, finally, providing for re-issue of a patent, by enacting that whenever any patent then or thereafter granted should be invalid or inoperative by reason that any of the terms or conditions prescribed for the sufficiency of disclosure and distinguishment of an invention had not, by inadvertence, accident, or mistake, and without any fraudulent or deceptive intent, been complied with, the Secretary of State might, upon surrender of the patent, cause a new patent to be granted for the same invention, for the residue of the period then unexpired, upon compliance with requisite terms of an application for patent; in case of the death of an inventor, or an assignment by him of the patent, vesting the right of re-issue in his executor, administrator, or assignee; but providing that the new patent so granted should be liable in all respects to the same manner of objection and defence as the original patent; and declaring that no public use or privilege of the invention so patented, derived from or after the grant of the original patent, either under any special license, or without the special consent of the patentee, should prejudice his right of recovery for any use or violation of his invention after the grant of such new patent as aforesaid.

The act of 1793 was finally supplemented by an act, approved July 13, 1832,<sup>1</sup> extending the privilege of obtaining patents by aliens, to every alien who, at the time of making application was a resident of the United States and had declared his intention, according to law, to become a citizen thereof; but providing that every patent so granted should cease in case of failure of the patentee for the space of one year from the issuance thereof to introduce the invention into public use in the United States, or in case the invention should not so continue for a period of six months, or the applicant should fail to become a citizen, agreeably to notice given, at the earliest period within which he would be entitled so to become.

The act of 1793, with all amendments and additions, was repealed and supplanted by an act approved July 4, 1836,<sup>2</sup> which

<sup>1</sup> Act of July 13, 1832, c. 203, 4 Statutes at Large, 577.

<sup>2</sup> Act of 1836, c. 357, 5 Statutes at Large, 117.

differed from the previous one by establishing the Patent Office attached to the Department of State, with a small force of officials, creating the office of Commissioner of Patents, prescribing the duties of that office, with salary same as the "Commissioner of the Indian Department" and franking privilege, and with bond, and bond of the Chief Clerk, who should perform duties of the Commissioner in absence of the latter, and during vacancy in that office, and render a quarterly account of all moneys received; prohibiting every person employed in the Patent Office from acquiring, except by inheritance, any interest in any patent during incumbency of appointment; requiring oath for faithful performance of duties from every employee of the office; providing for a seal; giving Commissioner or his representative authority for issuing certified copies, with cost of same, such then to be as competent evidence as the original; requiring patents to be countersigned by the Commissioner, and under seal of the Patent Office, and to be recorded in books to be kept for that purpose; requiring that every patent shall contain a short description, or title of the invention, or discovery, correctly indicating its nature and design, and a grant to the applicant, his heirs, administrators, executors, or assigns, of the exclusive right to the invention for fourteen years; requiring inventions to be patented, not, at the time of application for patent, to have been in public use or on sale, with consent of inventor; requiring inventors to point out particularly what they claim as their invention, and make oath that they were the original and first inventors of the subject desired patented; that they did not know or believe that the same was ever before known or used, and also of what country they are citizens, and requiring advisory information to be given to the applicant by the Patent Office and a return of a portion of the filing fee, if the applicant should be found not to be the original inventor or discoverer and upon his relinquishment of all claim to the model; requiring new oath for further prosecution of a rejected application; providing for a board of examiners to be composed of three disinterested persons appointed by the Secretary of State, who had power to reverse the Commissioner's decision on appeal by applicant; vesting the Commissioner with power to declare an interference; allowing six months from the date of publication of a foreign patent within which to file the U. S. application, with privilege of antedating

domestic patent to date of domestic application, if not more than six months prior to actual issue; providing for the filing of specifications and drawings in the secret archives of the Patent Office until model furnished, but for a time not exceeding one year, with entitlement to notice of interfering applications; fixing fee for citizen, or alien who had resided here for one year next preceding and made oath of his intention to become a citizen, at \$30, for a subject of the King of Great Britain at \$500, and for all other persons, at \$300; establishing patent fund; providing for application by executor or administrator; requiring record of transfer of any interest in patents within three months of date of execution, with record fee of \$3; providing for the filing of caveats by citizens or preferred aliens above, with course of procedure where interfering application, the fee, \$20, to be credited on subsequent application for same invention; making fee, on filing application for reissue, \$15; providing that, it appearing that, at the time of his application, the patentee believed himself to be the first inventor, knowledge or use of an invention in a foreign country, unless the same were patented or appeared in a printed publication, should not invalidate a patent; providing that when the plaintiff failed to sustain his action by claiming too much, but the defendant had used any part rightly claimed, the court should make an equitable award of costs; that whenever there should be two interfering patents, or when the grant of any patent should be refused by a board of examiners, by reason of interference with an existing unexpired patent, any one interested in the patent, in the one case, and any such applicant, in the other, might have remedy by a bill in equity, the court to have power to declare the patent void, but such adjudication to affect the rights only of parties to the action, and those deriving title from them subsequent to the judgment; providing that all actions arising out of laws relating to the grant of patents shall be originally cognizable as well in equity as at law, by the circuit courts of the United States, or any district court having like power and jurisdiction, from judgments and decrees rendered by any such courts, writs of error or appeal to lie to the Supreme Court; where extensions were desired, the Commissioner being authorized to allow the same, after publication in one of the principal papers of Washington and the section of country most interested adversely to the extension of the patent, and should any

objection be raised by any person whatever, a board consisting of the Secretary of State, the Commissioner of Patents, and the Solicitor of the Treasury, deciding whether or not the extension should be granted, the term being limited to seven years, provided the same was granted before the expiration of the term for which the patent was originally granted; providing for a library, and for a gallery for the deposit of models, to be kept open during suitable hours for public inspection.

The Patent Office having been burned on the 15th of December, 1836, and a large part of the records destroyed, the act of 1836 was supplemented by an act approved March 3, 1837,<sup>1</sup> providing that any person in possession of, or interested in, a patent issued prior to December 15, 1836, or in any assignment recorded prior to that day, might have the same again recorded and drawings made, without charge; providing for a board of commissioners to obtain the patents, etc.; making it the duty of the clerks of the judicial courts of the United States to transmit to the Commissioner of Patents a statement showing all the patents, assignments, etc., recorded in their offices prior to December 15, 1836; that certified copies of these records should be *prima facie* evidence in courts of the United States; that no patent granted, or assignment thereon executed, prior to December 15, 1836, should be received in evidence after the following June, unless the same were recorded anew and drawing verified; limiting the sum to one hundred thousand dollars for supplying new models; authorizing the Commissioner to issue new patent to patentee when original patent was proved to be destroyed by burning of the Patent Office, upon his furnishing duplicate model, drawings, and description, verified by oath; appointing agents in twenty of the principal cities and towns of the United States to receive and forward models to the Patent Office; providing that to have patent issue to assignee, assignment must first be of record; providing for the filing of a disclaimer by the patentee when he had claimed too broadly; when application shall be made for an addition to an existing patent, or for a reissue, providing that the specification of every such application or patent may be revised in the same manner as an original application if, in case of reissue, the patentee desire several patents to be issued

<sup>1</sup> Act of 1837, c. 45, 5 Statutes at Large, 191.

for distinct and separate parts of the thing patented, he to have the same upon paying \$30 for each divisional patent; providing that a patent was not to be void by reason of claiming too broadly, but that a patentee may maintain suit if he enter a disclaimer in the Office to that part unjustly claimed; providing an additional examining clerk, an additional copying clerk, and giving the Commissioner authority to appoint as many temporary clerks as would be necessary to complete the records; providing for the payment of a rebate to foreigners on applications which might be rejected and withdrawn; allowing affirmation for oath; making it obligatory upon every person, before getting anything from the Patent Office to resupply whatever he could that was destroyed by the fire of 1836, and requiring the Commissioner to make an annual report to Congress of all receipts and expenditures, and the numbers, names and dates of all patents granted during the year.

This act was further supplemented by an act, approved March 3, 1839.<sup>1</sup> The amendment provided for two assistant examiners; authorized the publication of a classified and alphabetical list of all patents granted by the Office previous to such publication, retaining one hundred copies for the use of the Office, and nine hundred for deposit in the Library of Congress; appropriated a sum of money to pay for the use and occupation of rooms in the City Hall by the Patent Office; appropriated one thousand dollars from the patent fund for the purchase of books for the library; provided that a foreign patent existing more than six months prior to application, should be no bar to grant of patent, if there had not been public use of the invention in the United States prior to application; that the American patent should be limited to fourteen years from date of publication of such foreign patent; that the user of the subject-matter of an invention, prior to the application, should not be liable to the inventor; nor that such use should invalidate the patent, unless it had continued for two years previous to filing the application; repealed the section providing for a fee for record of assignments; extended the remedy by bill in equity to cases where a patent had been refused for any reason, either by the Commissioner or the Chief Justice of the District of Columbia; prescribed appeal direct from Commissioner to the said Chief Justice, with proceedings and

<sup>1</sup> Act of 1839, c. 88, 5 Statutes at Large, 353.

fees and duties of the Commissioner and Judge ; repealed the portion of the act appointing a board of examiners ; provided for annual payment of one hundred dollars to the Chief Justice out of the patent fund ; and empowered the Commissioner to regulate taking of evidence in cases before him.

This act was further supplemented by an act, approved August 29, 1842,<sup>1</sup> which provided for the return of moneys paid into the Patent Office by mistake ; extended the act which authorizes the renewing of patents lost prior to the 15th of December, 1836, to patents granted prior to said date, though lost subsequently ; provided for the grant of design patents for seven years to citizens, or to aliens who had resided in the United States one year and taken the oath of intention to become citizens, the fee to be one-half of that payable in ordinary applications ; provided for the taking of an oath by one residing temporarily abroad ; provided a penalty for imitating or counterfeiting any article patented by another, and required inventors or owners of patents, under a penalty, to mark on their goods the date of the patent.

An act, approved May 27, 1848,<sup>2</sup> provided for two additional principal examiners and two assistant examiners, all principal examiners to receive \$2500 per annum, each, and assistant examiners \$1500 ; prescribed that the power of extending patents should be vested solely in the Commissioner of Patents, instead of in the board composed of the Secretary of State, the Commissioner of Patents, and the Solicitor of the Treasury ; prescribed fees for recording any conveyance of an interest in letters-patent ; provided for two additional clerks ; and gave the Commissioner power to send the annual reports free through the mails.

By an act, approved March 3, 1849,<sup>3</sup> the Patent Office was transferred to the Interior Department.

An act, approved August 30, 1852,<sup>4</sup> provided for appeal from the decision of the Commissioner of Patents to either of the assistant judges of the circuit court of the District of Columbia, or to the Chief Justice, and that on such appeal, the Commissioner should

<sup>1</sup> Act of 1842, c. 263, 5 Statutes at Large, 543.

<sup>2</sup> Act of 1848, c. 47, 9 Statutes at Large, 231.

<sup>3</sup> Act of 1849, c. 108, 9 Statutes at Large, 395.

<sup>4</sup> Act of 1852, c. 107, 10 Statutes at Large, 75.

pay the judge appealed to, twenty-five dollars, instead of the one hundred dollars a year, as heretofore provided.

By an act, approved March 3, 1859,<sup>1</sup> the Secretary of the Interior was directed to cause the annual report of the Commissioner on mechanics to contain plates and drawings, with the text, in one volume of not exceeding eight hundred pages.

An act, approved February 18, 1861,<sup>2</sup> provided that, in any patent action, suit, controversy, or case at law, or in equity, writ of error, or appeal shall lie to the Supreme Court of the United States, without regard to the sum or value in controversy.

An act, approved March 2, 1861,<sup>3</sup> provided for the taking of affidavits and depositions, and prescribed rules relating thereto; provided for the appointment of three examiners-in-chief, at a salary of \$3000 each, per annum, appeal from their decision to lie to the Commissioner of Patents, in person, to revise and determine the validity of adverse decisions by the examiners, upon written petition by the applicant, after the application had been twice rejected, or in interference cases; and to determine upon applications for extension of patent when required by the Commissioner, and perform other duties by him assigned; prescribed that, after first rejection by an examiner, an applicant should have no second examination until, in view of references given on first rejection, he made new oath of invention; increased the salaries of the Commissioner of Patents, of the chief clerk, and of the librarian of the Patent Office; authorized the Commissioner to restore to applicants, or otherwise dispose of, models belonging to rejected applications; made models of designs unnecessary; repealed section of act of 1837, which authorized the appointment of agents for transportation of models and specimens to the Patent Office; gave the Commissioner power to appoint as many additional principal, first assistant, and second assistant examiners, not exceeding four of each class, and the expenditures of the Office not exceeding the receipts, as necessary to transact the business of the Office; authorized the Commissioner to have papers, incorrectly or badly written, printed at cost of party filing the same; also for gross misconduct, and subject to approval of the President of the United States, to refuse to

<sup>1</sup> Act of 1859, c. 80, 11, Statutes at Large, 422.

<sup>2</sup> Act of February 18, 1861, c. 37, 12 Statutes at Large, 130.

<sup>3</sup> Act of March 2, 1861, c. 88, 12 Statutes at Large, 246.



recognize any person as a patent agent, either generally or in any particular case; prohibited any moneys paid as fees from being returned; enacted that the fee filed with a caveat should not be considered as part of the application fee; that the three months' notice to a caveator should date from day of deposit of notice in post-office at Washington; abolished the additional improvement system by requiring independent patents for improvements; revised the fees; provided for the granting of design patents for three and one-half, seven, or fourteen years, at the option of applicant; regulated the fee for each term, and provided for extension of design patents; provided that applications must be completed for examination within two years after filing the petition; that applications for extensions should be made at least ninety days before expiration of patent; abolished penalty for failing to stamp patented articles, but allowed no damages to plaintiff unless he had notified defendant of the infringement; authorized the Commissioner to have ten copies of each patent and drawing made, one copy on parchment to be transmitted with the patent; made printed copies of patents of the United States, under seal of the Patent Office and certified and signed by the Commissioner, legal evidence of their contents; and changed the term of patent to seventeen years, prohibiting extension thereof.

By an act approved July 16, 1862,<sup>1</sup> five thousand eight hundred and fifty-five dollars and forty-nine cents was appropriated for the fund of the Patent Office to supply a deficiency and the printing of ten copies of the specification and drawing of each patent was abolished.

By an act, approved March 3, 1863,<sup>2</sup> requirement of renewal of the oath to prosecute a rejected application was abolished; empowered the Commissioner, when the revenue of the Patent Office would justify, to make the compensation of the employees the same as on the thirty-first day of August, 1861; and limited the time for paying final fee to six months after allowance, on failure to do which the invention should become public property as against the applicant, where allowance had been made previous to this act, the six months to be reckoned from the date of its passage.

<sup>1</sup> Act of 1862, c. 182, 12 Statutes at Large, 583.

<sup>2</sup> Act of 1863, c. 102, 12 Statutes at Large, 796.

By an act, approved June 23, 1865,<sup>1</sup> applicants or assignees who had not paid the final fee within the six months required by the Act of March 3, 1863, were allowed six months after passage of the act in which to do so; but no action would lie against any person who had been manufacturing or using the invention.

By an act, approved March 3, 1865,<sup>2</sup> any person having an interest in an invention disclosed in an application which had lapsed for want of payment of the final fee within the six months, was given the right to make new application for the patent, provided such application were made within two years after the date of allowance of the original application; no person to be liable for past use; and the act to apply to cases thereafter as well as previously filed.

By an act, approved June 27, 1866, it was prescribed that, upon appealing for the first time from a primary examiner to the examiners-in-chief, the appellant should pay a fee of ten dollars.

The Act of 1836, with all amendments and additions, was repealed and supplanted by a new act, approved July 8, 1870.<sup>3</sup>

This new act formally attached the Patent Office to the Department of the Interior; designated the officers as one commissioner, one assistant commissioner, three examiners-in-chief; one chief clerk, one examiner in charge of interferences, twenty-two principal examiners, twenty-two first assistant examiners, twenty-two second assistant examiners, one librarian, one machinist, one hundred and six clerks of various grades, and one messenger and purchasing clerk, all to be appointed by the Secretary of the Interior, *upon nomination by the Commissioner of Patents*; gave the Secretary of the Interior, *upon like nomination*, authority to appoint such additional clerks, laborers, etc., as might from time to time be appropriated for by Congress; and fixed the salaries of the various officials. Beyond this, the act of 1870 differed from the preceding act in requiring that duties which might be assigned the examiners in-chief, by the Commissioner, and heretofore undefined, should be *like* duties to those defined; and in enacting that the Commissioner, subject to approval of the Secretary of the Interior,

<sup>1</sup> Act of 1864, c. 159, 13 Statutes at Large, 194.

<sup>2</sup> Act of 1865, c. 112, 13 Statutes at Large, 533.

<sup>3</sup> Act of 1870, c. 230, 16 Statutes at Large, 198.

might, from time to time, establish rules and regulations, not inconsistent with law, for the conduct of proceedings in the Patent Office; that in case of the inability of the Commissioner to act, his duties would devolve on the Assistant Commissioner; that the Commissioner should cause to be printed copies of all matters necessary for the information of the public; that public use or sale should be fatal to grant of patent, even without knowledge or consent, as also proof of the abandonment of the invention; that no patent should be refused, or any patent declared invalid by reason of the invention having been first patented in a foreign country, if it had not been introduced into public use in the United States for more than two years previous to the American application, limiting its term, however, to that of the foreign patent, or, if there were more than one, to that having the shortest term, but patent never to be in force more than seventeen years; required signature of inventor or his attorney to the drawing, to be attested by two subscribing witnesses; that the Commissioner might require specimens in applications for patents on compositions of matter; that patents might be re-issued to the assignee of the inventor, but the assignment first to be of record in the Patent Office, and the application for re-issue to be made and the specifications to be sworn to, by the inventor, if living; that every person who may have purchased from the inventor, or with his consent may have constructed any newly invented machine, or other patentable article, prior to the application by the inventor for a patent, or sold or used one so constructed, shall have the right to use, and vend to others to be used, the specific thing so made or purchased, without liability therefor; that the clerk of any United States court, for any district or territory wherein testimony is to be taken for use in any contested case pending in the Patent Office, shall, upon the application of any party thereto, or his agent or attorney, issue a subpoena for any witness residing or being within the jurisdiction, commanding him to appear and testify before any officer in said jurisdiction authorized to take depositions and affidavits, at any time and place in the subpoena stated; and if any witness, after being duly served with such subpoena, shall neglect or refuse to appear, or after appearing refuse to testify, the judge of the court whose clerk issued the subpoena, may, on proof of such neglect or refusal, enforce obedience to the process, or punish the disobedience as in other like

cases; that every witness duly subpoenaed and in attendance shall be allowed the same fees as are allowed to witnesses attending the United States courts, but no witness shall be required to attend at any place more than forty miles from the place where the subpoena is served upon him, nor be deemed guilty of contempt for disobeying such subpoena, unless his fees and traveling expenses in going to, returning from, and one day's attendance at the place of examination, are paid or tendered him at the time of the service of the subpoena; nor for refusing to disclose any secret invention or discovery made or owned by himself; made the course of appeal from primary examiner to board of examiners-in-chief, thence to the Commissioner, and from him, except in interference cases, to the supreme court of the District of Columbia, in banc, prescribing duties of Commissioner and court on appeal, with remedy by bill in equity, on any refusal for any reason by Commissioner (thus giving remedy beyond Commissioner in interference cases) or by court, in reissue cases, declared surrender of original patent first to take effect upon the actual issue of the amended patent; made copies of specifications and drawings of foreign patents, certified by Commissioner or Acting Commissioner, under seal of Patent Office, *prima facie* evidence of the grant, and of their date and contents; gave the Commissioner authority to extend patents issued prior to March 2, 1861, for seven years, making the term twenty-one years, and regulated the fees; and, finally, in grant of design-patents, omitted restrictions as to aliens.

By an act approved March 3, 1871,<sup>1</sup> it was provided that the requirement that application by assignees for re-issues should be sworn to by the inventor or discoverer, should not apply to patents issued and assigned prior to July 8, 1870.

By an act, approved March 24, 1871,<sup>2</sup> the Commissioner was empowered to regulate the fees for printed copies of specifications and drawings, with ten cents (the fee now charged) as minimum and fifty cents as maximum.

The act of 1870 with all amendments and additions was repealed, and a new act approved June 22, 1874,<sup>3</sup> was substituted therefor.

The principal points of difference between this act and the one

<sup>1</sup> Act of 1871, 16 Statutes at Large, 583.

<sup>2</sup> Act of 1871, 17 Statutes at Large, 2.

<sup>3</sup> Revised Statutes, Title LXXIV.

immediately preceding, being that, in addition to the offices already created in the Patent Office, it created that of examiner of trademarks, increased the number of principal, first assistant and second assistant examiners to twenty-four each, provided for twenty-four third assistant examiners, three skilled draughtsmen, and thirty-five copyists of drawings, besides sixteen attendants in the model room; authorized the publication of one hundred and fifty complete copies of patents and drawings for gratuitous distribution, designating how they were to be disposed of; also providing for the printing of such additional copies to be sold as may be warranted by the actual demand; and provided for the lithographing and engraving of drawings, and to have the same put out to the lowest and best bidder.

This act was amended by an act, approved February 16, 1875,<sup>1</sup> providing that circuit courts when sitting in equity for the trial of patent cases could impanel a jury subject to the general laws made by the Supreme Court, and submit to the jury such questions of fact arising in the causes as the court should deem expedient.

An act, approved February 18, 1888,<sup>2</sup> so amended the act of 1870 as to allow the Assistant Secretary of the Interior to sign patents instead of the Secretary.

The validity of patents signed by a second assistant Secretary of the Interior having been questioned, the act of February 18, 1888, was amended by an act approved April 19, 1888,<sup>3</sup> which authorized any Assistant Secretary of the Interior to sign patents, in lieu of the Secretary.

Section 4886 of the Revised Statutes, provides that:

“Any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement thereof, not known or used by others in this country, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof, and not in public use or on sale for more than two years prior to his application, unless the same is proved to have been abandoned, may upon payment of the fees required by law, and other due proceedings had, obtain a patent therefor.”

<sup>1</sup> Act of 1875, 18 Statutes at Large, part 3, 316.

<sup>2</sup> Act of 1888, 25 Statutes at Large, 40.

<sup>3</sup> 25 Statutes at Large, c. 126, p. 87.

The first requisite, then, is that there shall have been invention or discovery, and it is necessary to consider what constitutes invention or discovery.

It is to be noted, however, that the word "discovery," as employed in the Constitution and the statute, has not its broadest signification; but means *invention* there and means nothing else.<sup>1</sup>

Invention, as something produced by man, may be defined to be some creation of the brain in the nature of physical performance or embodiment; the origination of applications of natural principles to the satisfaction of human wants, embodied in practically operative form;<sup>2</sup> an unobvious, original, concrete conception in mechanical or chemical procedure, or in physical result or effect; an original concrete solution of an unobvious or hitherto unsolved problem in the arts, which is susceptible of physical production or embodiment. Invention is then a contrivance by man.

In the general or abstract sense, discovery means recognition of an existing but previously unknown fact, an uncovering, or discovering thereof, the fact's disclosure or appearance to man.

The discovery or recognition of a principle or law of nature, like the discovery of a hitherto unrecognized place on the earth's surface, is not a discovery in the sense of the patent law; is not invention. A principle or law of nature is never patentable, since such is not the creation of man. It will be easy to distinguish *patentable* discovery from discovery in the general sense by considering that patentable discovery consists in human action. The action may be stated as broadly as possible, so that others following may not evade the exclusive right thereto of the originator by mere additions or refinement; but some act must be indicated positively, sufficient to produce the result. Whether a person be the first or not to have perceived or recognized the existence of some law of nature, it is not new merely because he did not know it to exist. The same has always existed, and no man can properly assert ownership thereof, or exclusive right to its initiatory or adjunctive use for the production of an effect or result; neither can he claim an abstract result by whatever manner produced, since such would be tantamount to an assertion of ownership of the use

<sup>1</sup> *Ex parte* Kemper, Cranch, Pat. Dec., p. 89; 1 McArthur's Patent Cases, 4, 1841.

<sup>2</sup> Judge Bates, Examiner-in-Chief, U. S. Patent Office.

of any law of nature for the particular purpose. Principles and abstract results are, therefore, not patentable, because there can be no exclusive right to the use of natural laws. They are also not patentable, because an award of any exclusive right in them would be opposed to promotion of progress of science and useful arts, and so opposed to terms of the Constitution. Whether a person projects something following an original perception by himself of a law of nature, or following an explanation by another to him of a law of nature, or with common knowledge of a well-known law of nature, has nothing to do with invention or the manner of claiming the same.

There seems to be some confusion among writers on the subject of discovery and invention and principle. It is generally recognized, emphatically enough, that, as heretofore stated, the expression, "discovery," as used in the Constitution and the statutes, means invention and nothing else; but, after stating this fact, many fall into a discussion of principle and become vague. They draw in the word "discovery," appear to attribute a mystic and occult intent in the word to those who first employed it, and seem to strive to show that employment of the word "discovery" had some far-sighted reference to permission to claim a principle. One writer, in an attempt to distinguish discovery from invention, struggles with principle as making the recognition of a new principle confer upon the discoverer of the new principle the right to what he calls a "discovery patent," with right to claim the principle, a sort of explorer's or navigator's right; and he draws his conclusion as that of the Supreme Court of the United States, from his discovery of a circumstance, in nowise alluded to by the court as having had any effect upon its conclusions, but still, perhaps, existing, that in four cases sustained having broad claims,<sup>1</sup> a hitherto unrecognized peculiarity of matter was taken advantage of by the inventor, whereas, in another case involving a generic invention in which the claim was not sustained,<sup>2</sup> the performance did not involve the use of any hitherto unrecognized peculiarity of matter or law of nature first employed by the inventor.

<sup>1</sup> *McClurg v. Kingsland*, 1 Howard, 202, 1843; *Mowry v. Whitney*, 14 Wallace, 620, 1871; *Tilghman v. Proctor*, 102 U. S., 707, 1880; and *Telephone cases*, 126 U. S., 531, 1888.

<sup>2</sup> *O'Beilly v. Morse*, 15 Howard, 112, 1853.

Another reason from these decisions, that a claim is not patentable if it merely involves the use of one law of nature, but is good if it asserts exclusive right to the joint use of two or more.

A correct judicial conclusion may well be drawn from consideration of the decisions in the five cases involving generic invention, above referred to; but a more correct conclusion can, it is thought, be drawn from the direct action of the court upon the claims presented for its consideration.

It will suffice to say that in the four cases, the claims in which were sustained, the claims were (whether taking advantage of a newly-recognized, or of a well-known law of nature, principle, or peculiarity of matter) to the physical performance of the inventor, of an operation, conducted by rule to produce a useful result; while in the case in which the claim was not sustained,<sup>1</sup> this claim was for the use of a law of nature for a particular purpose.

The broad claim in the Bell telephone patent (the fifth claim) appears to some minds to be a claim to the use of a law of nature; but it can only be on the ground that it is *not* such, but is to a human performance, taking advantage of a law of nature, that it has been sustained.

Great mystification and astonishment are sometimes expressed at the adverse decision on the broad claim in the Morse case, while the other patents are sustained, and occasional hints at inconsistency on the part of the Supreme Court are thrown out. There is no inconsistency. In the Morse case, the court merely refused to allow a law of nature to be locked against all mankind but one, for a particular purpose or application. In the other cases, it confirmed the rights of property in the first and original performers each of an operation, conducted by rule to produce a useful result.

The broad claim of Morse, the eighth claim, was:

"I do not propose to limit myself to the specific machinery, or parts of machinery, described in the foregoing specifications and claims; the essence of my invention being the use of the motive power of an electric or galvanic current, which I call electro-magnetism, however developed, for marking or printing intelligible characters or signs at any distance, being a new application of that power of which I claim to be the first inventor or discoverer."

<sup>1</sup> O'Reilly v. Morse, involving the Morse patent.



In other words, he claimed the exclusive use of electro-magnetism for a particular purpose. If Morse had claimed his own performance, instead of attempting to assert exclusive proprietorship of a law of nature, his claim above would undoubtedly have been sustained.

Suppose the claim had been in the following form, which would not only have given the protection then sought, but, in some respects, as not limiting the performance of necessity, by marking or printing, to the production of intelligible characters, signs or letters, have been even broader than as stated above, viz.:

"The method of producing intelligible characters, signs, letters or signals (to include sound) at a distance, which consists in conducting a current of electricity around a suitable body, as a core of soft iron, thus rendering the same magnetic, causing it to attract an armature (which was old), and then systematically interrupting the current, magnetizing and demagnetizing the body, and causing it successively to attract and release, and thus move the armature in predetermined times (which was new, and so carries the claim) to convey intelligible signs to the eye or ear, substantially as described."

This claim would probably have been sustained.

The following would have been a still broader claim, and, if Morse was the first to employ electricity, by make and break of the current to convey intelligence to a distance, he might have covered Bain (the chemical telegraph), too, viz.:

The method of conveying intelligence to a distance, which consists in conducting a current of electricity from one place to another, and systematically interrupting or diminishing it, alternately establishing and interrupting or diminishing the current, and causing the intervals to be marked or otherwise indicated.

And this might also have been sustained.

It has thus been shown that principle, in the sense of a law of nature, is not invention.

The principle of a machine, that is, its function, in the sense of its necessary action, mode of operation, use, or abstract effect, is also not invention, but the function of machinery, meaning, thereby, the expected action of a machine, by its parts acting as they are constructed and placed to act, and as, from their form or position, they

must act,—or the abstract result or effect of the employment of a machine,—is not to be confounded with (and, in consideration of patentability, injuriously affect) novel, useful, and important function carried out by any means,—by machinery, if desired,—or with a novel, useful and important, concrete result or effect,—a product or composition of matter by any means made,—by machinery, if desired.

The decision of the Supreme Court in *Corning v. Burden*<sup>1</sup> is, it would seem, somewhat distorted wherever it is alleged to assert that function, i.e., procedure or operation, cannot be the proper subject of a patent if it be carried into effect by machinery, since a procedure consisting of steps carried on by rule, if an invention by itself, is none the less so because new machinery may be constructed, or old machinery be operated in a novel way, to carry it into effect. What was brought out in *Corning v. Burden*, in this respect, is, that where a performance is old by hand, merely carrying it out by a new machine does not make it an invention. It is then the mere function of the machine made to perform it, does not involve invention, would wrongfully prohibit the use of subsequent different and better machines for performing the same function or producing the same effect by barring all subsequent inventions in machinery having the same function or principle, and would thus obstruct progress of a useful art, and so be in contravention of the Constitution; but a patent could scarcely be held bad on the ground that its claim (if not to an abstract principle or law of nature) is yet so broad to a certain performance as to prohibit the use of all subsequent, different and better machines for carrying out that performance; since it is the great aim to obtain for every broadly-new invention such a claim as will, during the life of the patent, dominate, render tributary, and control all improvements. A strong example is the Bell telephone patent.

It may be said, in general, that if a performance or production of man be original with the producer, be not obvious, or frivolous, and be productive of a useful result, it amounts to invention.

As to a performance or production being obvious, if a particular result was long desired and sometime sought, but never obtained,

<sup>1</sup> 15 Howard, 267, 1853.

want of invention cannot be predicated of a device or process which first reached that result, on the ground that simplicity of the means is so marked that many believe they could readily have produced it if required.<sup>1</sup> While the law does not look to the mental process by which the invention has been reached, but to the character of the result itself, it may still require that the result shall be such as not to exclude the possibility of the exercise of thought. The question is not, whether thought has been exercised, but whether it may not have been exercised.

It is not invention merely to substitute one part for another, or superior for inferior materials.<sup>2</sup> If the substitution involved a new mode of construction, or developed new uses and properties of the article made, it may amount to invention.<sup>3</sup> So, also, where the excellence of the material substituted could not be known beforehand, and where practice showed its superiority to consist not only in greater cheapness and greater durability, but also in more efficient action, the substitution of a superior for an inferior material was held to amount to invention.<sup>4</sup> And substantially the same doctrine has been held by Mr. Justice Bradley,<sup>5</sup> and by Judge Wallace.<sup>6</sup> It is not invention so to enlarge and strengthen a machine that it will operate on larger materials than before;<sup>7</sup> nor

<sup>1</sup> Celluloid Mfg. Co. v. Chrolithion Collar and Cuff Co., 23 Fed. Rep., 397, 1885; Celluloid Mfg. Co. v. American Zylonite Co., 28 Fed. Rep., 195, 1886; Dudgeon v. Watson, 29 Fed. Rep., 248, 1886; International Crown Co. v. Richmond, 30 Fed. Rep., 778, 1887; Wilcox v. Bookwalter, 31 Fed. Rep., 229, 1887; Osborne v. Glazier, 31 Fed. Rep., 4C2, 1887; Palmer v. Johnson, 34 Fed. Rep., 336, 1888; Stegner v. Blake, 36 Fed. Rep., 185, 1888; Marvin v. Gotshall, 36 Fed. Rep., 908, 1888; Timken v. Olin, 37 Fed. Rep., 205, 1888; Tondeur v. Chambers, 37 Fed. Rep., 333, 1889; but see, The Corn-Planter Patent, 23 Wallace, 232, 1874; Vinton v. Hamilton, 104 U. S., 491, 1881; Atlantic Works v. Brady, 107 U. S., 199, 1882.

<sup>2</sup> Hotchkiss v. Greenwood, 11 Howard, 248, 1850; Hicks v. Kelsey, 18 Wallace, 670, 1873; Terhune v. Phillips, 99 U. S., 593, 1878; Gardner v. Herz, 118 U. S., 192, 1885; Brown v. District of Columbia, 130 U. S., 87, 1888; *In re* Maynard, 1 McArthur's Patent Cases, 536, 1857; Post v. Hardware Co., 26 Fed. Rep., 618, 1886; Forschner v. Baumgarten, 26 Fed. Rep., 858, 1886; J. L. Mott Iron Works v. Cassidy, 31 Fed. Rep., 47, 1887; National Roofing Co. v. Garwood, 35 Fed. Rep., 658, 1888; Welling v. Crane, 14 Fed. Rep., 571, 1882.

<sup>3</sup> Smith v. Dental Vulcanite Co., 93 U. S., 496, 1876.

<sup>4</sup> Dalton v. Nelson, 13 Blatch., 357, 1876.

<sup>5</sup> Celluloid Mfg. Co. v. Crane Chemical Co., 36 Fed. Rep., 110, 1888.

<sup>6</sup> Celluloid Mfg. Co. v. American Zylonite Co., 35 Fed. Rep., 301, 1888.

<sup>7</sup> Phillips v. Page, 24 Howard, 164, 1860; Planing Machine Co. v. Keith, 101 U. S., 490, 1879; Peters v. Mfg. Co., 129 U. S., 530, 1888.

to change the degree of a thing, or of one feature or a thing.<sup>1</sup> Aggregation is not invention.<sup>2</sup>

It is not invention to duplicate one or more of the parts of a machine;<sup>3</sup> nor to omit one or more of the parts of an existing thing, unless that omission causes a new operation of the parts retained;<sup>4</sup> nor to improve a known structure by substituting an equivalent for any of its parts;<sup>5</sup> nor to combine old devices into a new article without producing any new mode of operation;<sup>6</sup> nor to use an old thing or process for a new purpose. This is called double use.<sup>7</sup>

To change the form of a machine or manufacture is sometimes invention, and sometimes not. Where a change of form is within the domain of mere construction, it is not invention; but where it involves a change of mode of operation, or a change of result, it may be invention.<sup>8</sup>

<sup>1</sup> *Glue Co. v. Upton*, 97 U. S., 6, 1877; *Guidet v. Brooklyn*, 105 U. S., 552, 1881; *Estep v. Burdett*, 109 U. S., 640, 1883; *Preston v. Manard*, 116 U. S., 663, 1885; *Stow v. City of Chicago*, 3 Bann. & Ard., 91, 1877; *White v. Lee*, 14 Fed. Rep., 790, 1882; *Woonsocket Rubber Co. v. Candee*, 23 Fed. Rep., 797, 1885; *Smith v. Murray*, 27 Fed. Rep., 69, 1886; *Hurd v. Snow*, 35 Fed. Rep., 423, 1888.

<sup>2</sup> *Hailes v. Van Wormer*, 20 Wallace, 353, 1873; *Reckendorfer v. Faber*, 92 U. S., 357, 1875; *Pickering v. McCullough*, 104 U. S., 318, 1881.

<sup>3</sup> *Dunbar v. Myers*, 94 U. S., 197, 1876; *Millner v. Voss*, 4 Hughes, 262, 1882.

<sup>4</sup> *Stow v. City of Chicago*, 3 Bann. & Ard., 92, 1877; *McClain v. Ortmayer*, 33 Fed. Rep., 287, 1888; *Enterprise Mfg. Co. v. Sargent*, 28 Fed. Rep., 187, 1886; *Lawther v. Hamilton*, 124 U. S., 1, 1887; *Schlicht and Field Co. v. The Sherwood Letter File Co.*, 49 O. G., 243, 1888.

<sup>5</sup> *Smith v. Nichols*, 21 Wallace, 119, 1874; *Crouch v. Roemer*, 103 U. S., 797, 1880; *Cochrane v. Waterman*, 1 *McArthur's Patent Cases*, 54, 1884; *Perry v. Foundry Co.*, 12 Fed. Rep., 436, 1882; *Celluloid Mfg. Co. v. Tower*, 26 Fed. Rep., 451, 1885; *In re Hebbard*, 1 *McArthur's Patent Cases*, 550, 1887.

<sup>6</sup> *Stimson v. Woodman*, 10 Wallace, 117, 1869; *Heald v. Rice*, 104 U. S., 754, 1881; *Hall v. Macneale*, 107 U. S., 90, 1882; *Searles v. Merriam*, 22 *Off. Gaz.*, 1040, 1882; *Union Paper Collar Co. v. Leland*, 1 Bann. & Ard., 491, 1874; *Cone & Morgan Envelope Co.*, 4 Bann. & Ard., 109, 1879; *Mahn v. Harwood*, 3 Bann. & Ard., 517, 1878; *Yale Lock Mfg. Co. v. National Bank*, 17 Fed. Rep., 533, 1883; *Kapps v. Hartung*, 23 Fed. Rep., 187, 1885; *Troy Machinery Co. v. Bunnell*, 27 Fed. Rep., 810, 1886; *Union Edge Setter Co. v. Keith*, 31 Fed. Rep., 46, 1887; *Washburn & Moen Mfg. Co. v. Barbed Wire Co.*, 33 Fed. Rep., 273, 1888; *Low v. Stove Co.*, 36 Fed. Rep., 903, 1888.

<sup>7</sup> *Tucker v. Spalding*, 13 Wallace, 453, 1871; *Brown v. Piper*, 91 U. S., 37, 1875; *Roberts v. Ryer*, 91 U. S., 157, 1875.

<sup>8</sup> *Winans v. Denmead*, 15 Howard, 341, 1853; *Davis v. Palmer*, 2 Brock, 310, 1827; *Mabie v. Haskell*, 2 Cliff, 510, 1865; *Aiken v. Dolan*, 3 Fisher, 204, 1867; *United States Bung Mfg. Co. v. Independent Bung Co.*, 31 Fed. Rep., 76, 1887.

A question of invention is a question of fact and not of law;<sup>1</sup> and patents are not held void for want of invention except where invention is clearly absent.<sup>2</sup>

When a person invents the subject-matter of a narrow claim upon a certain entity, in the same moment of time and as the same sense-concept, he invents that of any broader claim thereon, to which he may have a right; hence, a second patent to him with claim to subject-matter which comprehends the claim of his previous patent is void as being anticipated in such previous patent, and so the allowance of applications with claims to specific devices, or "species," while an application containing a "generic" claim covering those species is in controversy or withheld, is condemned.<sup>3</sup>

An invention may be made by two or more persons jointly as well as by one alone. If an invention be joint, and application for patent is made by fewer than all the joint inventors, the resulting patent is void; so also if an invention be sole, and application is made by two or more persons as inventors.

To constitute a person an inventor, it is not necessary for him to have skill enough to embody his invention in a working machine, or in a model, or even in a drawing. If he furnish all the ideas needed to produce the invention aimed at, he may avail himself of the mechanical skill of others, practically to embody or represent his contrivance, and still be the sole inventor thereof.<sup>4</sup> But it is not invention to conceive a result, and then employ another to produce that result.<sup>5</sup>

Invention is carefully to be distinguished from mere technical skill, which is not patentable.

Technical skill may be defined to be the educated capacity in the practice of the arts, to set up and carry out necessary conditions for successful work.

It is doubtful whether a mere prescription, forming the body of a so-called patent medicine—more properly designated proprietary

<sup>1</sup> *Poppenhusen v. Falke*, 5 Blatch., 49, 1862; *Shuter v. Davis*, 16 Fed. Rep., 564, 1883.

<sup>2</sup> *Reiter v. Jones*, 35 Fed. Rep., 421, 1888; *Marvin v. Gotshall*, 36 Fed. Rep., 908, 1888.

<sup>3</sup> *Ex parte Holt*, 29 O. G., 171.

<sup>4</sup> *Sparkman v. Higgins*, 1 Blatch., 209, 1846; *Stearns v. Davis*, 1 *McArthur's Patent Cases*, 696, 1859.

<sup>5</sup> *Streat v. White*, 35 Fed. Rep., 426, 1888.

remedy, since these remedies are usually not patented,—really exhibits invention; for no matter how good and efficient the remedy may be (and that many of them are of a high degree of excellence cannot be doubted), it is still a question whether (many other conditions being disregarded) where the result of education in the medical art has brought in a formula for the cure of disease, there is anything beyond technical skill.

There seems to be no decision by any court on the subject of the patentability of a medicine; but in the Morton Anæsthetic case, VIII., *Opinions of Attorneys-General*, 272, Mr. Attorney-General Cushing said:

“The discovery of a fact that a given natural substance will, under appropriate methods of administration, produce a particular pathological or physiological effect, is not patentable under any existing statute.”

The “natural” substance referred to was ether, no less artificial than would be an assemblage of medicaments making a composition or compound.

Of course, if, in the production of the medicine, difficulties are overcome in an unexpected or unobvious manner, the procedure will present invention; so also will the product, if it be an unobvious result, such as a new salt; or if, with certainty, it produces new and unexpected effects, but scarcely otherwise.

The next requirement of the statute is, that the subject-matter shall be new. As already shown, the subject-matter may be new without exhibiting invention, but it also may exhibit invention without being new.

Novelty is not negated by knowledge and use in a foreign country prior to invention of the subject here, if, at the time of application, the applicant believed himself to be the first inventor, and if the subject-matter had not been previously patented, or described in a printed publication, anywhere;<sup>1</sup> nor by mere prior knowledge in this country that the subject-matter was in use elsewhere, before its invention here;<sup>2</sup> nor by a secret foreign patent;<sup>3</sup> nor by a published English provisional specification or similar

<sup>1</sup> Revised Statutes, 4887 and 4923.

<sup>2</sup> *Doyle v. Spalding*, 19 Fed. Rep., 746, 1884.

<sup>3</sup> *Brooks v. Norcross*, 2 Fisher, 661, 1851.

publication, unless the same amounts to a full and unquestionable disclosure of the invention, before the date of invention in this country; nor by an English patent, unless the complete specification thereof was published before the date of the American invention.<sup>1</sup> In a recent decision,<sup>2</sup> Mr. Commissioner Mitchell, with excellent discrimination, shows what times constitute the dates of publication and of patenting in England under the present law as distinguished from the law of 1852, and the law previous thereto.

Novelty is not negated by any publication prior to the invention of the applicant, unless the publication contains such clear and precise information as to enable any person skilled in the art to which the subject appertains, to perform, compound or make the thing covered in the case of the inventor with certainty and without experiment;<sup>3</sup> nor by any prior abandoned application for a patent,<sup>4</sup> nor by any successful application, nor by any documents pertaining thereto, other than the patent issued thereon;<sup>5</sup> nor by any prior unpublished drawings, no matter how completely they may exhibit the invention;<sup>6</sup> nor by any prior model;<sup>7</sup> but may be negated by a thing abandoned long before the later independent invention,<sup>8</sup> and possibly by an unsuccessful abandoned experiment prior to the

<sup>1</sup> *Smith v. Goodyear Dental Vulcanite Co.*, 93, U. S. 498, 1876.

<sup>2</sup> Decision of Commissioner of Patents in *De Ferranti v. Westinghouse*, 52 O. G., 457.

<sup>3</sup> *Seymour v. Osborne*, 11 Wallace, 516, 1870; *Cawood Patent*, 94 U. S. 704, 1876; *Downton v. Milling Co.*, 108 U. S., 466, 1882; *Eames v. Andrews*, 122 U. S., 66, 1886; *Roberts v. Dickey*, 4 Fisher, 532, 1871; *Cahill v. Brown*, 3 Bann. & Ard., 580, 1878; *Hammerschlag v. Scamoni*, 7 Fed. Rep., 584, 1881.

<sup>4</sup> *Corn-Planter Patent*, 23 Wallace, 211, 1874; *N. W. Extinguisher Co. v. Philadelphia Extinguisher Co.*, 1 Bann. & Ard., 177, 1874; *Lyman Ventilating and Refrigerator Co. v. Lalor*, 1 Bann. & Ard., 403, 1874.

<sup>5</sup> *Howes v. McNeal*, 5 Bann. & Ard., 77, 1880.

<sup>6</sup> *Ellithorp v. Robertson*, 4 Blatch., 309, 1859; *Draper v. Potomska Mills*, 3 Bann. & Ard., 214, 1878; *Detroit Lubricator Mfg. Co. v. Renchard*, 9 Fed. Rep., 293, 1881; *Odell v. Stout*, 22 Fed. Rep., 159, 1884; *Pennsylvania Diamond Drill Co. v. Simpson*, 29 Fed. Rep., 291, 1886.

<sup>7</sup> *Cahoon v. Ring*, 1 Cliff, 593, 1861; *Stainthorp v. Humiston*, 4 Fisher, 107, 1864; *Johnson v. McCullough*, 4 Fisher, 170, 1870; *Stillwell & Bierce Mfg. Co. v. The Cincinnati Gas Light & Coke Co.*, 1 Bann. & Ard., 610, 1875.

<sup>8</sup> *Waterman v. Thomson*, 2 Fisher, 463, 1863; *Shoup v. Henrici*, 2 Bann. & Ard., 249, 1876; *N. W. Extinguisher Co. v. Philadelphia Extinguisher Co.*, 1 Bann. & Ard., 177, 1874; *McNish v. Everson*, 5 Bann. & Ard., 484, 18

later invention.<sup>1</sup> Novelty is not negated by the fact that every part of the patented thing is old if the result be new;<sup>2</sup> nor by a prior accidental production of something unaccompanied by knowledge on the part of the producer sufficient to enable him to repeat that production;<sup>3</sup> nor by anything invented, patented or described in a printed publication prior to the granting of the patent sought to be anticipated, or even prior to the application therefor, unless the anticipating event occurred prior to the date of the invention secured by that patent.<sup>4</sup> Novelty is negated by a prior knowledge or use in this country, by even a single person, of the subject-matter.<sup>5</sup>

This rule even applies to cases where that knowledge or use was purposely kept secret;<sup>6</sup> applies, no matter how limited that use may have been.<sup>7</sup> Novelty is also negated by the making of even a single specimen of the subject-matter prior to the invention of the applicant or patentee, even though the specimen was not used.<sup>8</sup> Negation of novelty is not affected by the fact that the inventor had no knowledge of the anticipating matter when he made the invention covered by the patent.<sup>9</sup> The Patent Laws do not reward people for producing things which, though new to them, are old to others in this country. A new manner of making an old substance does not make the substance new and patentable.<sup>10</sup>

<sup>1</sup> *Gayler v. Wilder*, 10 Howard, 477, 1850; *Sayles v. Railway Co.*, 4 Fisher, 588, 1871; *Stephenson v. Railroad Co.*, 14 Fed. Rep., 459, 1881.

<sup>2</sup> *Bates v. Coe*, 98 U. S., 48, 1878; *Imhäuser v. Buerk*, 101 U. S., 660, 1879; *Parks v. Booth*, 102 U. S., 104, 1880; *Cantrell v. Wallick*, 117 U. S., 694, 1885; *Johnson v. Railroad Co.*, 33 Fed. Rep., 501, 1888.

<sup>3</sup> *Ransom v. New York*, 1 Fisher, 265, 1856; *Pelton v. Waters*, 1 Bann. & Ard., 599, 1874; *Andrews v. Carman*, 2 Bann. & Ard., 277, 1876.

<sup>4</sup> *Cochrane v. Deener*, 94 U. S., 791, 1876; *Elizabeth v. Pavement Co.*, 97 U. S., 130, 1877; *Parker v. Hulme*, 1 Fisher, 52, 1849; *Bartholomew v. Sawyer*, 1 Fisher, 520, 1859.

<sup>5</sup> *Coffin v. Ogden*, 18 Wallace, 120, 1873; *Brush v. Condit*, 20 Fed. Rep., 832, 1884.

<sup>6</sup> *Reed v. Cutter*, 1 Story, 598, 1841.

<sup>7</sup> *Bedford v. Hunt*, 1 Mason, 301, 1817; *Rich v. Lippincott*, 2 Fisher, 2, 1853.

<sup>8</sup> *Corn-Planter Patent*, 23 Wallace, 220, 1874; *Parker v. Ferguson*, 1 Blatch, 408, 1849; *Pitts v. Wemple*, 2 Fisher, 15, 1855; *Stitt v. Railroad Co.*, 22 Fed. Rep., 650, 1884.

<sup>9</sup> *Many v. Sizer*, 1 Fisher, 19, 1849.

<sup>10</sup> *Cottle v. Kremetz* 31 Fed. Rep., 42, 1887.



Questions of novelty are questions of fact.<sup>1</sup> In the case of a patent, proof of lack of novelty rests upon him who avers it, and every reasonable doubt should be resolved against him,<sup>2</sup> and novelty can only be negated by proof which puts the fact beyond reasonable doubt.<sup>3</sup> The presumption is that the subject-matter of a patent is novel.<sup>4</sup> Affirmative testimony of persons that they saw, or knew, or used a particular thing at a particular time and place, may have doubt cast upon it by negative testimony of persons conversant with the particular place at the particular time, who did not see or know the thing alleged.<sup>5</sup>

The next requirement is that the subject-matter shall be useful. The expression *useful*, in a patent sense, means, in general, not inoperative, nor injurious to the morals, health, or good order of the public, and capable of producing a good result. Utility of a device is negated by inoperativeness thereof.<sup>6</sup> The fact that a device is susceptible of improvement which will make it operate better does not negative utility;<sup>7</sup> nor is utility negated by the

<sup>1</sup> *Battin v. Taggart*, 17 Howard, 74, 1854; *Turrill v. Railroad Co.*, 1 Wallace, 491, 1863; *Bischoff v. Withered*, 9 Wallace, 812, 1869.

<sup>2</sup> *Coffin v. Ogden*, 18 Wallace, 120, 1873; *Cantrell v. Wallick*, 117 U. S., 696, 1885; *Parham v. Machine Co.*, 4 Fisher, 482, 1871; *Webster Loom Co. v. Higgins*, 4 Bann. & Ard., 88, 1879; *Shirley v. Sanderson*, 8 Fed. Rep., 908, 1881; *Green v. French*, 11 Fed. Rep., 591, 1882; *Duffy v. Reynolds*, 24 Fed. Rep., 858, 1885; *Dreyfus v. Schneider*, 25 Fed. Rep., 481, 1885; *Osborne v. Glazier*, 31 Fed. Rep., 404, 1887; *Smith v. Davis*, 34 Fed. Rep., 785, 1888; *Howard v. Plow Works*, 35 Fed. Rep., 745, 1888.

<sup>3</sup> *Wood v. Mill Co.*, 4 Fisher, 560, 1871; *Hawes v. Antisdel*, 2 Bann. & Ard., 10, 1875; *Bignall v. Harvey*, 4 Bann. & Ard., 636, 1880; *Worswick Mfg. Co. v. Buffalo*, 20 Fed. Rep., 126, 1884; *Thayer v. Hart*, 20 Fed. Rep., 694, 1884; *Everest v. Oil Co.*, 20 Fed. Rep., 849, 1884; *American Bell Telephone Co. v. People's Telephone Co.*, 22 Fed. Rep., 313, 1884; *McDonald v. Whitney*, 24 Fed. Rep., 600, 1885; *Jennings v. Kibbe*, 24 Fed. Rep., 698, 1885; *Wetherell v. Keith*, 27 Fed. Rep., 364, 1886; *Hobbie v. Smith*, 27 Fed. Rep., 659, 1886; *Cohansey Mfg. Co. v. Wharton*, 28 Fed. Rep., 191, 1886; *American Bell Telephone Co. v. Globe Telephone Co.*, 31 Fed. Rep., 733, 1887.

<sup>4</sup> *Cluett v. Claffin*, 30 Fed. Rep., 922, 1887; *Untermeyer v. Freund*, 37 Fed. Rep., 343, 1889.

<sup>5</sup> *Sayles v. Railway Co.*, 4 Fisher, 588, 1871; *Washburn & Moen Mfg. Co. v. Haish*, 4 Fed. Rep., 900, 1880; *Green v. French*, 11 Fed. Rep., 591, 1882.

<sup>6</sup> *Bliss v. Brooklyn*, 10 Blatch., 522, 1873; *Rowe v. Blanchard*, 18 Wisconsin, 465, 1864.

<sup>7</sup> *Wheeler v. Reaper Co.*, 10 Blatch., 189, 1872.

fact that some prior invention performs the function quite as well,<sup>1</sup> or even better,<sup>2</sup> or that the invention has been entirely superseded by something superior.<sup>3</sup> Utility may reside in decoration of something to which the invention is attached.<sup>4</sup> It is negated if the exercise of the invention be injurious to the morals, health, or good order of society;<sup>5</sup> but not necessarily by the fact that the article, subject of the invention, is an imitation of a natural substance.<sup>6</sup> Utility is negated by the fact that the procedure or device is injurious to the thing to which it is applicable.<sup>7</sup> A patent is *prima facie* evidence of utility,<sup>8</sup> and doubts should be resolved against infringers.<sup>9</sup>

The term *art*, as employed in the statute, means a manner of procedure, that is, a mode, method or process; mode or method being, perhaps, the proper designation where the operations, being mechanical, are constantly reliant upon the initial source, that is to say, where each operation is mechanically performed, and the elements or ingredients suffer no change in themselves to produce an effect, one upon the other; for example, a mode of operation or sequence of *acts*, a manipulation of mechanism or a modification of the usual operations of existing mechanism involving invention; whereas, *process* seems the proper designation where the properties of one or more of the ingredients, under particular conditions, are relied upon to produce the desired result. A patentable mode or method, or a patentable process, comprises either: first, a new procedure for obtaining a new and useful result; second, a new procedure, involving invention, for obtaining an old and useful result; third, a modification of an old procedure, obtaining a new and useful result; or fourth, a modification involving inven-

<sup>1</sup> *Seymour v. Osborne*, 11 Wallace, 516, 1870; *Shaw v. Lead Co.*, 11 Fed. Rep., 715, 1882.

<sup>2</sup> *Bell v. Daniels*, 1 Fisher, 375, 1885.

<sup>3</sup> *Railway Co. v. Sayles*, 97 U. S., 1878; *Poppenhusen v. Comb Co.*, 2 Fisher, 272, 1858; *McComb v. Ernest*, 1 Woods, 203, 1871.

<sup>4</sup> *Magic Ruffle Co. v. Douglas*, 2 Fisher, 330, 1863.

<sup>5</sup> *Bedford v. Hunt*, 1 Mason, 301, 1817.

<sup>6</sup> *In re Corbin and Martlett*, 1 McArthur's Patent Cases, 521, 1857.

<sup>7</sup> *Klein v. Russell*, 19 Wallace, 433, 1873; *Wilton v. Railroad Co.*, 1 Brightley's Fed. Digest, 618, 1849.

<sup>8</sup> *Vance v. Campbell*, 1 Fisher, 483, 1859.

<sup>9</sup> *Whitney v. Mowry*, 4 Fisher, 215, 1870; *Lehnbeuter v. Holthous*, 105 U. S., 94, 1881; *LaRue v. Electric Co.*, 31 Fed. Rep., 82, 1887.

tion, or a simplification of an old procedure, obtaining an old and useful result in a cheaper, more expeditious, or otherwise better manner.<sup>1</sup>

The term *machine*, as employed in the statute, means an assemblage of co-acting, functionally-inorganic instrumentalities. The expression covers apparatus as well as machinery, although, strictly speaking, apparatus is distinguished from machinery in the more specific meaning of the term *machine*, since machinery is dynamic, while apparatus is static. In choice of language for a patent, one must not allow himself to be misled into considering as a machine, in the specific meaning of the term, an apparatus, which may need to be induced to exert its action by extraneous dynamic impressions. If a device, in and of itself and distinctly, exerts its effect statically, that there may be extraneous impressions to cause it to act, renders it none the less an apparatus, and from this it will be seen how inartificial it appears to call, for example, a bicycle a "machine," or to designate such means as ice-making apparatus or carbureting apparatus as "machinery." It would be just as proper to designate an ordinary carriage, or a piano-forte, as a "machine." But the word "machine" in the statute must be taken broadly to cover all *mechanical* means, dynamic or static, so that the static means be not properly included under the word "manufacture," that is, article of manufacture, meaning a mere instrumentality, tool, utensil, implement or article.<sup>2</sup> An apparatus must, therefore, be classed as a "*machine*" in the sense of the patent acts.<sup>3</sup>

The term "*manufacture*," as employed in the statute, has not the broad meaning which it has in the sense of the English law, where, as already shown, it will cover anything in the nature of invention. In our law it means anything made from raw materials, by hand, by machinery, or by art, such as cloths, utensils, implements, shoes, single objects, etc.; otherwise stated, it designates a material or assemblage of materials constituting a result or production, in the form of a vendible article, not machinery; something complete in itself for some special use, or, if part of a whole, so far complete as to be the subject of separate manufacture and sale, as an article of trade.

<sup>1</sup> *Ex parte* H. Jerome Burr, Ms. Dec. Exrs.-in-Chief, U. S. Pat. Off., vol. 22, p. 454.

<sup>2</sup> *Ex parte* Blythe, 30 O. G., 1323.

<sup>3</sup> *Ibid.*

The term "*composition of matter*," as employed in the statute, and especially as defined by the practice of the Patent Office, means a body, the function of which results not from its structural form, but from its internal qualities, or the qualities of its ingredients. Composition of matter may be either a mere mixture, or may be a compound, that is, a chemical union of two or more ingredients. If, in a leading case,<sup>1</sup> the artificial alizarine produced from anthracine had been properly designated as a composition of matter, instead of as an article of manufacture, it might have been clear to the framer of the specification and claim, that if the alizarine was to be the same as natural alizarine, it would have the same constituent parts as natural alizarine, in the the same proportions, and as this would have had to be set up in the claim, it would have been clear at once that the substance was old; while on the other hand, if the constituents were not the same, and in the same proportions as those of natural alizarine, what the substance was, would also have clearly appeared.

An *improvement* in subject-matter is any change therein, not wanting in invention, in novelty, and in utility.

The statute sets forth how the subject-matter must be described in the specification, and it demands, furthermore, that it shall be distinctly claimed. Where it is in the nature of an art, that is, a mode, method, or process, the purpose of the procedure must be given, and the precise and most approved manner of carrying it out. In the case of a machine the principle thereof must be explained, and the best mode in which it is contemplated applying it; in the case of a manufacture, or a composition of matter, setting forth the purpose of invention, the manner of producing must be stated fully, and the product must be described by physical characteristics. No product may be described by its manner of production.

After the subject-matter has been properly described in the specification, the great and the anxious consideration is the claim.

It must be borne in mind that the measure of a patent is the claim. Only those who have proper legal, scientific, and technical knowledge, with the advantage of long experience, can be experts in the art of describing an invention concisely, and, at the same

<sup>1</sup> *Cochrane et al. v. Badische Anilin and Soda Fabrik*, 27 O. G., 813.

time, comprehensively ; and the care and skill requisite in the drawing of a proper claim, or of proper claims to an invention, can scarcely be over-estimated.

The drawing of vague claims cannot too emphatically be condemned. If the claim is made vague intentionally, the act is unwise, since the claim then will not be in conformity with the statute, which requires that the invention shall be *distinctly* claimed ; and, furthermore, such a claim, if by any chance it passes the Patent Office, is apt to suffer in the courts, where it is subjected to the severest criticism. But vague claims are generally the work of ignorance, of a confused and impotent mind, or of a lazy or unconscientious person. A tersely-stated and at once comprehensive claim is generally the clear and crystallized effort of an able mind. A claim may be as broad as possible, and still be so clear that any person of ordinary intelligence can understand just what it covers. No set rule can be given for the drawing of claims upon inventions, since every case must be treated by itself, and the adequacy or propriety of the claim will depend largely upon the care and scope and the acumen of the solicitor ; but it is not difficult to give forms in which the several subjects-matter of inventions should be claimed. It would seem that a method or process claim, to be correct in form should be about as follows :

The method (or process) of accomplishing a stated (distinctly named) result, which consists in certain steps, described in sequence as active operations—not passive occurrences, or events, or results,—substantially as described.

Or, where the procedure is an *improvement* in some general art, by effecting some new special result, the claim should, it seems, be in about the following form :

In such and such an art, or, as an improvement in such and such an art, the method (or process) of effecting such and such an improvement, giving it a name, *i.e.*, naming the result specifically, distinguishing it, and not calling it “improvement” merely, or by some other such general, or indefinite or merely laudatory term, which consists in certain steps detailed in sequence, substantially, etc. And where there are two or more groups of operations, each effecting a definite result, there may be, in addition to the broad claim, and the claim detailing the complete procedure with its complete result, as many sub-process claims as there are novel,

useful, definable and distinguishable sub-results. In this respect, methods or processes are analogous to mechanical combinations.

It is not proper to claim "improvement," for such, undefined, is a mere abstraction. The *name* of the improvement should appear, that is to say the accomplishment, which may be pre-supposed to be an improvement, when adequately distinguished and not frivolous or detrimental. It is equally incorrect to claim a mode or process of "treating," or the like, since even detailing the steps does not of necessity designate the achievement or improvement.

Finally, in every method or process claim, the *modus operandi* or procedure, must be independent of particular mechanism, or material, that is to say, it must be capable of exercise by more than one machine and thus not be the mere operation, or result or mere *use*—the mere function—of a particular machine, or apparatus, or substance.

The use of an improved composition in an expected, *i.e.*, an ordinary manner, that is the mere use of a new composition, is not a process.

A claim in machinery to be correct in form should be to the machine naming the parts, or to a combination of instrumentalities in the machine to effect a particular result, and there may be as many claims upon a machine invention, as there are distinct, definable sub-results. A patentable combination may be defined to be a novel assemblage of co-operative parts exhibiting invention, each part having an especial function to perform, and all the parts co-acting, whether simultaneously or not, toward the establishment of a unitary and useful result.<sup>1</sup>

A claim to an article of manufacture must name the characteristics by which it is to be recognized and distinguished, by those conversant with the subject to which it relates, and should not refer to the process of making it.<sup>2</sup> To refer to a material substance by the mechanical process, involved in its production, by the sequence of manipulations to which it has been subjected, is not such a description or designation of the article as will cause it to be distinguished in the market. Unless an article can be described by some sensible property, how can it be recognized and how can the user know that he is infringing? It is not incumbent upon the

<sup>1</sup> Lynch & Raff v. Dryden & Underwood, 3 O. G., 407, 1873.

<sup>2</sup> *Ex parte J. M. Cobb*, Com. Dec., 1874, p. 60.

public to experiment to find out if there be no other way of producing a certain article, in order to ascertain whether it is infringing a claim to the thing told about by detailing the steps of work performed, thus only describing the result by allusion, and leaving the sensible characteristics of the thing,—the properties of the thing as a piece of matter,—to the imagination. In the case of *Cochrane et al. v. Badische Anilin and Soda Fabrik*, Mr. Justice Blatchford, in delivering the opinion of the Supreme Court, referring to a claim which was as follows:

“Artificial alizarine produced from anthracine or its derivatives by either of the methods herein described, or by any other method which will produce a like result,” said:

“Every patent for a product or composition of matter must identify it so that it can be recognized aside from the description of the process for making it, or else nothing can be held to infringe the patent which is not made by that process.”

That is to say, or only the process would be infringed.

The other conditions of the obtainment of a valid patent, excepting the question of abandonment, have been treated in a general way, under the consideration of novelty.

Abandonment may be of two kinds: first, abandonment of the invention; second, abandonment of the application for patent only. Abandonment of the invention is always to the public. Abandonment of the application only is not, though the public may acquire right to an invention through abandonment of an application, as where it gets knowledge or use thereof before another original, that is, independent inventor makes the same invention, and more properly and diligently takes steps or pursues means to obtain a patent. But the acts of an applicant may still be such, that while the invention has not become abandoned to the public, he himself may not have a property right therein, that is to say, that he himself will have forfeited all right to the invention. An unsuccessful abandoned experiment affects no rights of any other person, and confers no right upon the party making it.<sup>1</sup>

An invention may be abandoned: by the party having a right thereto making express declaration of abandonment or dedication to the public; by disclaimer of such a party made in an application for a patent for some other invention, or otherwise filed in the

<sup>1</sup> *Am. Bell Tel. Co. v. Cushman Tel. Co.*, 35 Fed. Rep., 734, 1888.

Patent Office;<sup>1</sup> by such a party allowing the invention to be used, before application for patent; by public and not experimental use, with or without the knowledge or acquiescence of the party having a right to the invention, that is, use for two years before the application; by sale or offer for sale of the complete thing invented (even a single instance thereof), more than two years before application for patent, unless for purpose of experimentation; but sale of the invention, by assignment of the right thereto, is not a sale of the thing invented. Abandonment of invention in a structure will not result from the mere *making* of a specimen of the thing invented, before applying for patent;<sup>2</sup> but abandonment of a process may result from the carrying out thereof, since the carrying out of the process would be a use thereof.

An application only may be abandoned by failure on the part of the applicant or his representative, to complete the application for examination within two years from the date of filing; or by allowing two years to pass without substantial action responsive to the last official action; but in either of these cases, upon evidence satisfactory to the Commissioner of Patents that the delay was unavoidable, a patent may still be granted, and the Commissioner's decision on this point is conclusive.<sup>3</sup>

Abandonment of an application with or without abandonment of the invention to the public, according to circumstances as above outlined, will occur by abandonment of the application where it cannot be shown to the satisfaction of the Commissioner of Patents, that the delay in completion or prosecution thereof was unavoidable; by laches with regard to applying for a patent;<sup>4</sup> by long acquiescence in an erroneous rejection;<sup>5</sup> or by failure to renew an application within two years from the date of allowance, after the application has been permitted to lapse by non-payment of the final fee within six months from the time of allowance.

Forfeiture of all right to an invention on the part of any par-

<sup>1</sup> *Leggett v. Avery*, 101 U. S., 259, 1879.

<sup>2</sup> *Comstock v. Sandusky Seat Co.*, 3 Bann. & Ard., 188, 1878; *Campbell v. New York*, 36 Fed. Rep., 261, 1888.

<sup>3</sup> *M'Millin v. Barclay*, 5 Fisher, 1991, 1871.

<sup>4</sup> *Consol. Fruit Jar Co. v. Wright*, 94 U. S., 96, 1876; *Craver v. Weyhrich*, 31 Fed. Rep., 607, 1887.

<sup>5</sup> *Marsh v. Com.*, 3 Bissel, 321, 1872; *Consol. Fruit Jar Co. v. Stamping Co.*, 27 Fed. Rep., 377, 1886.



ticular party, without abandonment of the invention, may occur by abandonment of an application, by failure to complete or prosecute the same, where the delay was not unavoidable; by laches; and, perhaps, under the terms of Sec. 4897 R. S., where the application having been allowed to lapse by non-payment of the final fee within six months, it was not then renewed within two years from the date of allowance.

It has been alleged that public use or sale of a specimen of a newly invented thing, occurring in any foreign country *after its invention*, but more than two years before application for a U. S. patent will have the same effect upon the right to a patent, as it would have had if that public use or that sale had occurred in the United States;<sup>1</sup> but this has never been adjudicated. It seems that there is no decided constructive abandonment of an invention after the issue of a patent, under the present law, since there are no conditions of working the invention, etc.; but acquiescence by a patentee in the unlicensed use of his invention during the life of the patent, has been indicated by the courts to amount to an abandonment of the patent and of the invention.<sup>2</sup> Questions of abandonment are questions of fact,<sup>3</sup> and every reasonable doubt with regard thereto should be solved in favor of the patent, since the law does not favor forfeiture.<sup>4</sup>

A patent is a grant, presumably to the first and true inventor or inventors, whether citizen or alien, his or their heirs, legal representatives, or assigns, for the term of seventeen years, of the exclusive right to make, use, and vend an invention or discovery throughout the United States and the territories thereof, and is not a grant of a monopoly in the prohibited sense—that is, a grant which restrains others from exercise of a right or liberty which they had before the grant was made. It is a contract between the public and the patentee to be supported on the ground of mutual considerations,

<sup>1</sup> Walker on Patents, 2d edition, par. 101.

<sup>2</sup> Wyeth v. Stone, 1 Story, 282, 1840; Ransom v. N. Y., 1 Fisher, 273, 1856; Bell v. Daniels, 1 Bond, 219, 1858; Williams v. Boston & Albany Railroad Co., 4 Bann. & Ard., 441, 1879.

<sup>3</sup> Battin v. Taggart, 17 Howard, 84, 1854; Kendall v. Winsor, 21 Howard, 330, 1858.

<sup>4</sup> Pitts v. Hall, 2 Blatch., 238, 1851; McCormick v. Seymour, 2 Blatch, 256, 1851; Birdsall v. McDonald, 1 Bann. & Ard., 165, 1874; Comstock v. Sandusky Seat Co., 3 Bann. & Ard., 188, 1878.

and, being essentially a *bargain*, is to be construed like other contracts to which there are two parties, each having rights and interests involved in its stipulations. In this respect, the public, as party of the first part, through the medium of the Government, makes the grant above mentioned, while the inventor, as party of the second part, divulges his secret and causes benefit to flow to the public in two forms—*first*, by immediate practice of the invention under the patent, and, *secondly* by the practice of the invention, or opportunity to practice the same, which becomes the property of the public, which is free to the public, on the expiration of the patent.

To guard against the inventor's concealment of the manner by which the invention is practiced, and to guard against its loss, he is required to deposit in the Patent Office a written description of the invention sufficiently clear and explicit to enable others to practice the same therefrom.

There are two kinds of patents: Mechanical patents and design patents. A mechanical patent covers a concrete invention, one in the nature of a manufacturing art, a machine, an article of manufacture, or a composition of matter, and is granted for a term of seventeen years. A design patent covers an abstract invention, one in the nature of configuration of a manufacture, bust, statue, alto-relievo or bas-relief, to be employed in the mechanic arts, in manufactures or in constructions, not strictly works in the field of the fine arts, and may be granted according to the petition and the fee paid, for terms of three-and-a half, seven or fourteen years.<sup>1</sup> Minors can take patents as well as adults; married women as well as single. The mode of procedure to obtain a patent is fully set forth in an elaborate set of rules governing the practice of the Patent Office, which rules, not being inconsistent with the law, have the full force of the statute. Want of space, however, prevents full consideration of the intricate and somewhat complicated practice of the Patent Office.

Under what circumstances a patent may properly be re-issued, is set forth in the statute; but a more specific meaning has been given to the general terms of the statute by the decision of the Supreme Court in the case of *Miller v. The Bridgeport Brass Company*,<sup>2</sup> and

<sup>1</sup> *Yale Cigar Mfg. Co. v. Yale*, 30, O. G., 1187.

<sup>2</sup> *Miller v. Brass Co.*, 104 U. S., 350, 1881.

subsequent decisions<sup>1</sup> following the doctrine announced in this, where it is laid down that the right to obtain a re-issue, broadening the claims of the patent, is lost by too long lapse of time after the grant of the original patent and before the application for the re-issue. What will constitute fatal delay in applying for a broadened re-issue cannot be defined for every case. Where the specification is difficult and the claim involved, greater indulgence will be shown to the patentee, and the courts will always exercise proper liberality in this respect.<sup>2</sup> The general rule is that a delay of two years or more invalidates a re-issue with a broadened claim, unless that delay is properly accounted for by special circumstances;<sup>3</sup> but a period of less than two years has been held to be sufficient to defeat such a broadened re-issue, even in the absence of intervening rights, in a plain case;<sup>4</sup> six months being probably as long a delay as can then be excused.<sup>5</sup> In a simple case, where adverse rights had intervened, a period of ninety-seven days has been held to be too great.<sup>6</sup> The provision of the statute that application for re-issue must be made by the inventor, if living, or, if dead, by his executor or administrator, sometimes works hardship upon the assignee or assignees of the entire title, since the inventor, or his legal representatives, may not have the least interest in the patent, and yet the owner or owners may have to pay the inventor, or his legal representative, to perform an act solely for the correction of the defective patent. Furthermore, the inventor is not always easy to find.

An interference is a proceeding instituted in the Patent Office for the purpose of determining the question of priority of invention between two or more parties claiming substantially the same patentable invention. The fact that one of the parties has already obtained a patent will not prevent an interference, for, although the

<sup>1</sup> *Mahn v. Harwood*, 112 U. S., 361, 1884; *White v. Dunbar*, 119 U. S., 52, 1886; *Hartshorne v. Barrel Co.*, 119 U. S., 674, 1886; *Johnson v. Railroad Co.*, 105 U. S., 539, 1881; *Matthews v. Machine Co.*, 105 U. S., 54, 1881; *Bantz v. Frantz*, 105 U. S., 160, 1881.

<sup>2</sup> *Mahn v. Harwood*.

<sup>3</sup> *Hartshorne v. Roller Co.*, 18 Fed. Rep., 92, 1883; *Hartshorne v. Barrel Co.*, 119 U. S., 674, 1886.

<sup>4</sup> *Farmers' Mfg. Co. v. Corn-Planter Co.*, 123 U. S., 506, 1888; *New v. Warren*, 22 O. G., 588, 1882; *Haines v. Peck*, 26 Fed. Rep., 625, 1884.

<sup>5</sup> *McArthur v. Supply Co.*, 19 Fed. Rep., 263, 1884.

<sup>6</sup> *Coon v. Wilson*, 113 U. S., 277, 1884.

Commissioner has no power to cancel a patent, he may grant another patent for the same invention to a person who proves to be the prior inventor.

Interferences are declared in the following cases, when all the parties claim substantially the same patentable invention: first, between two or more original applications containing conflicting claims; second, between an original application and an unexpired patent containing conflicting claims when the applicant, having been rejected on the patent, shall file an affidavit that he made the invention before the patentee's application was filed; third, between an original application and an application for the re-issue of a patent granted during the pendency of such original application; fourth, between an original application and a re-issue application, when the original applicant shall file an affidavit showing that he made the invention before the patentee's original application was filed; fifth, between two or more applications for the re-issue of patents granted on applications pending at the same time; sixth, between two or more applications for the re-issue of patents on applications not pending at the same time, when the applicant for re-issue of the later patent shall file an affidavit showing that he made the invention before the application was filed on which the earlier patent was granted; seventh, between a re-issue application and an unexpired patent, if the original applications were pending at the same time, and the re-issue applicant shall file an affidavit showing that he made the invention before the original application of the other patentee was filed; eighth, between an application for re-issue for a later unexpired patent and an earlier unexpired patent granted before the original application of the later patent was filed, if the re-issue applicant shall file an affidavit showing that he made the invention before the original application of the earlier patent was filed. If the claim of one party includes that of another for the same subject-matter, there is an interference in fact.<sup>1</sup> The practice in interference cases is fully outlined in the rules of practice in the Patent Office.

Should an application for patent be rejected on its merits by the primary examiner in the Patent Office, to whom it has been referred, appeal may be taken to the board of examiners-in-chief, and

<sup>1</sup> *Ex parte Upton*, 27 O. G., 99.

should that tribunal reject the application, appeal may be taken to the Commissioner. If action of the examiner be upon a merely formal defect in an application, the matter may be brought to the consideration of the Commissioner in person by petition. Upon adverse action of the Commissioner of Patents on the merits of an application, appeal may be taken to the supreme court of the District of Columbia, sitting in banc, and should the Commissioner refuse to allow the appeal he may be compelled to do so by writ of *mandamus* granted by this court on petition of the applicant. Mere questions of form are not appealable beyond the Commissioner. The Secretary of the Interior has no control of, or revisory power over the judicial acts of the Commissioner of Patents, but his general directory and supervisory power may be invoked to determine the correctness of mere administrative acts of the Commissioner.

In interference cases appeal may be taken from the judgment of the Examiner of Interferences to the Examiners-in-Chief and thence to the Commissioner, but mere matters of form and questions of practice and motions may by petition at almost any stage of the proceedings be brought directly from the Examiner of Interferences before the Commissioner in person. In interference cases, no appeal will lie beyond the Commissioner of Patents.

Whenever a patent is refused by the Commissioner of Patents or by the supreme court of the District of Columbia, on appeal from the Commissioner, the applicant may file a bill in equity in any U. S. Circuit Court having or acquiring jurisdiction of the parties; so, also, may the party against whom the Commissioner decides an interference; but the only way in which any such court, excepting the supreme court of the District of Columbia, can acquire jurisdiction of the Commissioner, is by his voluntary appearance therein and submission thereto. The supreme court of the District of Columbia, however, has jurisdiction over the Commissioner of Patents for the purposes of actions of this kind by virtue of his official residence in the city of Washington in this district.<sup>1</sup>

Patents are now only extended by special act of Congress.

Title to an invention or a patent may be purely legal, purely equitable, or both legal and equitable. Legal and equitable title

<sup>1</sup> *Butterworth v. Hill*, 114 U. S., 128, 1885.

may be acquired by occupancy, by assignment, by grant, by creditor's bill, by bankruptcy, or by death. Purely equitable title cannot be acquired by occupancy, and purely legal title cannot be transferred by occupancy by creditor's bill or by bankruptcy. Title by occupancy is that acquired by invention. Assignment of a patent is the transfer of an undivided interest therein, that is to say, of the right to make, use and vend the invention throughout the United States, and an assignment is to be distinguished from a grant, which is a conveyance of right to make, use and vend the invention in less than the entire country, and a license or shop-right, which is anything less than a grant. A creditor's bill may transfer a complete title or an equitable title. Adjudication of bankruptcy and appointment of an assignee, operated under the bankrupt law of 1867, to vest in such assignee all patent rights of the bankrupt and all rights of action based thereon, except such as were held in trust by him, and except such as were exempted from attachment, or seizure, or levy on execution by virtue of the laws of the United States, or of the laws of the State in which the bankrupt had his domicile at the time of the commencement of the bankruptcy proceedings. Although this bankruptcy law was repealed in 1878, many titles to patent rights now in force were transferred by its operation, and it is therefore still a law of practical importance. Whenever new bankruptcy statutes are hereafter enacted, it is probable that similar provisions will be again inserted. Corresponding proceedings in insolvency under the State laws do not have the operation of bankruptcy proceedings in this particular. They do not confer upon the assignee in insolvency any new title to the patent rights of the insolvent.<sup>1</sup> But it is probable that courts which have jurisdiction of such proceedings may compel the insolvent to execute such an assignment to the assignee in insolvency as will convey the same rights to the latter as those which, without such a document, were conveyed to an assignee in bankruptcy under the bankrupt law of 1867.<sup>2</sup>

Death of an inventor before the grant of a patent effects a transfer of his inchoate right to his executor or administrator in trust.

There seems to be little doubt, that joint inventors or joint

<sup>1</sup> *Ashcroft v. Walworth*, 1 Holmes, 154, 1872.

<sup>2</sup> *Agar v. Murray*, 105 U. S., 131, 1881.

owners of an invention are, under all circumstances, tenants in common, and not joint tenants<sup>1</sup>; but there has been no decision on this point by the Supreme Court. It is not to be denied that joint-tenancy is a doctrine of the common law, which is as applicable to personal as to real property;<sup>2</sup> and that joint ownership of a patent may be characterized by the four conditions which constitute joint-tenancy, namely, unity of time, title, interest, and possession;<sup>3</sup> but survivorship is a distinguishing characteristic of joint-tenancy and the foundation for this description of estate, that is to say, the feudal system, has never existed in the United States. However, it may be prudent always to avoid as far as possible the circumstances which create a joint-tenancy, for, if joint-tenancy should be held to exist in a patent-right, its doctrine of survivorship would deprive the heirs or devisees of a dying joint-tenant of their just inheritance, and would confer that inheritance upon the joint-tenant who survived. Suspicion of a joint-tenancy may be easily destroyed by the destruction of one or more of the four essentials of joint-tenancy, as by assignment by joint inventors or owners to some person, and assignment by him, at different times, of a separate portion to each owner. Where a sole inventor makes an assignment of a part of his patent, he should avoid the common but artificial act of assigning to himself and another jointly; he should assign only a portion to the other. One joint owner of a patent may exercise all rights under the patent to any desired extent without the consent of any co-owner, unless conditions to the contrary have been stipulated.

An assignment of a patent is void as against a subsequent purchaser for a valuable consideration without notice, unless it shall have been placed of record in the Patent Office within three months of its date; but this rule does not apply to the assignment of any unpatented invention or application, and, since the assignment records of the Patent Office are open to public inspection, and it is usually desirable that the fact of application for patent should not be made public, it is generally best not to place the assignment on record until the time, or shortly before the time, of paying the final government fee to effect the issue of the patent.

<sup>1</sup> *Dunham v. Ind. & St. L. R.R. Co.*, 7 Biss., 223; 2 Bann. & Ard., 327; *Fraser v. Gates*, 20 Rep., 427; *Pitts v. Hall*, 3 Blatch, 201.

<sup>2</sup> *Blackstone*, Book 2, c. 25.

<sup>3</sup> *Blackstone*, Book 2, c. 12.

Licenses may be oral as well as written, but an oral license is not always as easy and certain of proof as a written license, and, besides, an oral license may sometimes be invalid as obnoxious to some statute of frauds. No warranty of validity of the letters patent is implied in any license given thereunder, and unattended proof of invalidity is therefore no defence to any suit for promised royalties. As long as a licensee continues to enjoy the benefit of the exclusive right, he must pay the royalty which he promised to pay, and he cannot escape from so doing by offering to prove the patent to be void. But a license does imply that the licensee shall not be evicted from its enjoyment, and such an eviction is a defence to a suit for royalties accruing after it occurred.<sup>1</sup> A license not expressly limited in duration continues till the patent expires or the license is forfeited. Forfeiture of a license does not follow from the single fact that the licensee has broken some covenant which was made by him when accepting the license, unless the parties expressly agreed that such a forfeiture should follow such a breach. And even where such an agreement is made, it will not always be enforced. For example, non-payment of royalty on the very day it becomes due, will not work a forfeiture if that non-payment arose from lack of certainty relevant to the place of payment, and from lack of demand from the licensor. Nor will forfeiture of a license result from the fact that the licensee has infringed the patent by doing acts with the invention which were unauthorized by the license.<sup>2</sup> Where a license is really forfeited, and the licensee continues to work under it as though it were still in force, the licensor has an option to sue him as an infringer, or to sue him for the promised royalties.<sup>3</sup> A license from one of two or more owners in common of a patent right, is as good as if given by all those owners; and a license given to one of several joint makers or users of a patented thing is as good as if given to all, if the licensor gives it with the understanding that the thing licensed to be done is to be done jointly, or is to be done by the express licensee on behalf of the other party.<sup>4</sup> The construction of a license in writing depends upon the same general rules as the construction of other written contracts.<sup>5</sup> No license is required to be recorded, and no record of a license affects the

<sup>1</sup> Walker on Patents, 2d edition. 235.

<sup>2</sup> *Ibid.*, 237.

<sup>4</sup> *Ibid.*, 234.

<sup>3</sup> *Ibid.*, 236.

<sup>5</sup> *Ibid.*, 234.



rights of any person ; for a license is good against the world whether it is recorded or not. So also, if a license is embodied in two papers, one of which limits the scope of the other, an assignee of the broader document will take subject to the limitations of the narrower, even if he had no notice thereof. Nor will the fact that the broader document was recorded, and the narrower one unrecorded, affect the operation of this rule. It follows, that where two licenses conflict, the first must prevail, even though the taker of the second had no notice of the existence of the first ; and it also follows that any license will prevail as against any subsequent assignee or grantee of the patent right involved.<sup>1</sup> A license to make a patented thing implies a right either to use or to sell the thing when made.<sup>2</sup> A license to use a patented thing implies a right to make it, and to employ others to make it, and will protect those others in making it, for the use of the licensee. If the license to use covers a greater length of time than one specimen of the thing to be used will last, then there is an implied right in the licensee to repair or to rebuild that specimen, or to replace it by another specimen made or purchased for that purpose.<sup>3</sup> A license to sell a patented thing does not imply any right to make it. But a license to sell implies a right to use and to sell again conferred on the vendees of the licensee.<sup>4</sup> A license to make and use does not authorize any sale of the thing so made, nor authorize any purchaser of that thing to use the same. Nor does a sale, coupled with an express license to use, give any right to use after the license has been forfeited or has expired. The purchaser of a patented thing gets no other right to use it than such right as the seller had an express or an implied right to convey. And the purchaser of a thing which is useful only in producing a patented article, or in being combined with other things to constitute a patented article, or when used to perform a patented process, gets thereby no right to use the thing for such a purpose. A license to make and sell, or to use and sell, implies a right in the purchaser to use, and repair and to sell again, the thing thus lawfully sold to him.<sup>5</sup> No license is assignable by the licensee to another, unless it contains words which show that it was intended to be assignable, and then, only as an entirety, unless otherwise expressed or implied.<sup>6</sup> Nor does an unassignable license pass to an executor or

<sup>1</sup> *Ibid.*, 234.<sup>2</sup> *Ibid.*, 230.<sup>3</sup> Walker on Patents, 2d edition, 231.<sup>4</sup> *Ibid.*, 231.<sup>5</sup> *Ibid.*, 232.<sup>6</sup> *Ibid.*, 238.

administrator of a deceased licensee. The purchaser of a license takes it subject to the same rate of royalty that the licensee had to pay; but not subject to any royalty or other money due from the licensee to the licensor, at the time of the assignment of license.<sup>1</sup> Purely implied licenses, from conduct of owners of patent rights, may arise out of any one of a considerable number of classes of facts; but, when analyzed, those facts will probably always be found to operate thus by virtue of the doctrines of acquiescence, or the doctrines of estoppel. But acquiescence in unpaid-for use does not always imply that no compensation is to be expected. Where the patentee was specially employed by the user to develop the business of the latter, at the time the former made the invention used in that business, the law implies a license to continue that use without paying royalty.<sup>2</sup> The estoppel which will work an implied license is that sort which is most accurately denominated estoppel by conduct; and all of the following elements are necessary to its existence: 1. There must have been a representation or a concealment of material facts. 2. The representation must have been made with knowledge of the facts. 3. The party to whom it was made must have been ignorant of the truth of the matter. 4. It must have been made with the intention that the other party should act upon it. 5. The other party must have been induced to act upon it. 6. That act must be hurtful to the party acting, in case the estoppel is not enforced in his favor.<sup>3</sup> An actual recovery of a full license fee, in an infringement suit for unlicensed making and selling a specimen of a patented thing, operates as an implied license to the purchaser of that specimen to use it to the same extent that he could lawfully have done if the infringer had been licensed to make and sell it. But to effect such a result something more than a judgment or a decree is necessary. There must be a satisfaction of that decree or judgment. And where the money recovered in an infringement suit for unlicensed making and selling a specimen of a patent thing, is recovered as damages for such making and selling alone, that recovery does not operate as an implied license authorizing the use of that specimen. Recoveries based on unlicensed use of a patented process or thing, are necessarily confined to such use as occurred before the suit was brought,

<sup>1</sup> *Ibid.*, 239.<sup>2</sup> *Ibid.*, 240.<sup>3</sup> *Ibid.*, 241.

if the action be at law, or to such as occurred before the final decree, if the action is in equity; and it therefore follows that no such recovery can operate to license any one to continue such use, or to begin a new use of that thing or that process.<sup>1</sup>

Interfering patents are such as have one or more claims in common. Of such patents all must be void but one, though all may be valid as to their other claims.<sup>2</sup> Interfering patents, or patents with interfering claims, are granted sometimes by inadvertence, or by erroneous judgment on the part of the Patent Office, sometimes as the result of an interference proceeding, in which a later applicant is held by the Patent Office to be entitled to a patent rather than the patentee. The decision of the Commissioner in favor of the patent last granted is *prima facie* evidence in its favor.<sup>3</sup> Adjudication upon interfering claims is by suit in equity, and such an action may be joined with an action for infringement. The only issue of fact between the parties is priority of invention of the subject matter; but there may be an issue of law also in an interference suit upon the construction of the patents involved, as to interference between them or not, and such an issue may be raised on demurrer.<sup>4</sup> Adjudication of the issue of fact in favor of one patent renders every other interfering patent in suit void so far as the particular subject-matter is concerned. Evidence of lack of novelty of the subject-matter as regards all the patentees in suit is not admissible under the statute, which authorizes only a decree voiding one or more of interfering patents, but not all. But a decree voiding every patent but one in an interference suit does not of necessity declare that one valid. Injunctions are not expressly authorized by the statute which provides for interference suits, and the law in this respect is unsettled. The law of evidence, if applicable to depositions taken in Patent Office interferences, would make those depositions admissible in a subsequent interference suit between the same parties on the same question of priority; but in the case of *Clow v. Baker*<sup>5</sup> it has been held that such depositions

<sup>1</sup> Walker on Patents, 2d edition, 242.

<sup>2</sup> Gold and Silver Ore Co. v. Disintegrating Co., 6 Blatch., 311, 1869.

<sup>3</sup> Wire Book Sewing Machine Co. v. Stevenson, 11 Fed. Rep., 155, 1882; Chicago Folding Box Co. v. Rogers, 32 Fed. Rep., 695, 1887.

<sup>4</sup> Morris v. Manufacturing Co., 20 Fed. Rep., 121, 1884.

<sup>5</sup> 36 Fed. Rep., 622, 1888.

are not thus admissible where there is no insuperable obstacle to retaking the testimony of the deponents.

A patent obtained by fraud may be repealed and annulled, but only by bill in equity filed in the circuit court for the district by the United States, acting through the United States district attorney of the district wherein it is filed;<sup>1</sup> and he acts under the direction of the Attorney General.<sup>2</sup> No person can compel the United States to file such a bill, or, after filing, control prosecution;<sup>4</sup> and the mere pendency of a bill to repeal a patent will have no effect upon a suit for infringement of that patent,<sup>5</sup> and no injunction will issue to restrain a patentee from bringing infringement suits pending a bill in equity to repeal the patent.<sup>6</sup>

A penalty of not less than one hundred dollars and costs, which may be sued for by any person in any *district* court of the United States wherein the offence was committed is attached to certain forbidden acts (see Sec. 4901, R. S.), one-half of the penalty, when recovered, going to the party suing, and the other half to the United States. The action is called a *qui tam* action, and is brought in the form of the common law action of debt.<sup>7</sup> A writ of error lies to the circuit court for the same district, from the final judgment of a district court in a *qui tam* patent case, because such a case is a civil one,<sup>8</sup> but no such writ of error lies then further to the supreme court, unless judgment to the amount of at least fifty penalties can be recovered in one action;<sup>9</sup> for a *qui tam* action is not one touching a patent right.<sup>10</sup>

Infringement of a patent can occur only by infringement of a claim thereof, but additions to processes or machines, the substitution in general of equivalents for one or more elements of the claim, or any mere change of form, of position, or of proportions thereof without changing the result, will not avoid infringement. An

<sup>1</sup> U. S. v. Bell Tel. Co., 128 U. S., 373, 1888; Mowry v. Whitney, 14 Wallace, 440, 1871.

<sup>2</sup> Attorney General v. Rumford Chemical Works, 2 Bann. & Ard., 308, 1876.

<sup>3</sup> U. S. v. Bell Tel. Co., 128 U. S., 350, 1888.

<sup>4</sup> N. Y. and Baltimore Coffee Polishing Co. v. N. Y. Polishing Co., 9 Fed. Rep., 580, 1881.

<sup>5</sup> Am. Bell Tel. Co. v. National Tel. Co., 22 Fed. Rep., 666, 1886.

<sup>6</sup> U. S. v. Colgate, 21 Fed. Rep., 318, 1884.

<sup>7</sup> Stimpson v. Pond, 2 Curtis, 505, 1855; Jacob v. U. S., 1 Brockenbrough, 520, 1821.

<sup>8</sup> Jacob v. U. S.

<sup>9</sup> R. S., Sec. 692.

<sup>10</sup> R. S., Sec. 699.

equivalent is something which performs the same function in substantially the same manner as the thing for which it is substituted.<sup>1</sup> A design patent is infringed by any design which, to general observers interested in the subject, or to the purchasers of things of similar design, has the same appearance as that of the design covered by the patent.<sup>2</sup> The circuit courts, as enacted by the statutes, have jurisdiction regardless of the amount involved, of all suits at law or in equity arising under the patent laws, the few district courts which have circuit court powers, and the district courts of the territories and the supreme court of the District of Columbia having the same jurisdiction; but the court of claims is the tribunal which has jurisdiction of all actions brought by owners of patent rights against the United States for compensation for implied licenses to the government to make and use patented inventions.<sup>3</sup> Actions arising under the patent laws are only such as go to the merits of a patent itself.

Owners in common of patent rights must sue jointly for their infringement, or the defendant may plead in abatement. Licensees under patents cannot bring actions for their infringement. They must be brought in the name of the owner of the patent right, but generally for the use of the licensee; and all actions in equity must be brought by the owner of the patent right and the exclusive licensees suing together as joint complainants, but the holder of a license, less than exclusive, need not join in an action in equity for an infringement of the patent under which he is licensed. Actions at law brought in the name of the owner of a patent right, but actually begun by an exclusive licensee, may be maintained by the latter, even against the will of the nominal plaintiff. And where an exclusive licensee brings in an action in equity in the name of himself and the owner of the patent right, that action may be maintained without the co-operation, and even against the objection of the latter. Natural persons cannot escape liability for their infringements of patents on the ground that they are minors, married women, or lunatics. A minor is not less liable to an action because

<sup>1</sup> *Potter v. Stewart*, 18 Blatch., 563, 1881.

<sup>2</sup> *Gorham v. White*, 14 Wallace, 528, 1871; *Perry v. Starrett*, 3 Bann. & Ard., 485, 1878; *Dryfoos v. Friedman*, 18 Fed. Rep., 824, 1884; *Tomkinson v. Manufacturing Co.*, 27 Fed. Rep., 895, 1884.

<sup>3</sup> *U. S. v. Palmer*, 128 U.S., 269, 1888; *McKeever v. U. S.*, 23 O. G., 1525, 1879.

the act of infringement was done at the command of his father;<sup>1</sup> but if a married woman commits an infringement in the presence of her husband she is not liable to an action therefor, unless it can be shown that she did it without his influence.<sup>2</sup> In the absence of such evidence the husband is alone liable for the torts of the wife which are committed in his presence, and for the infringements which are committed jointly by both.<sup>3</sup> The only distinction between the liability of lunatics and of sane persons, for such torts as infringements of patents, seems to be that the former can never be held liable for more than actual damages in an action at law,<sup>4</sup> or his actual profits in an action in equity.<sup>5</sup> An agent, or salesman, who sells specimens of a patented thing on commission is liable as an infringer for so doing. A plurality of patents may be sued upon in one action, where the inventions covered by those patents are embodied in one infringing process, machine, manufacture, or composition of matter, but not otherwise. But any action based on alleged infringement, in one process or thing of a plurality of patents, may be sustained by evidence that one of those patents was so infringed, though the others were not; and an action brought for alleged unlawful making, using and selling, may be sustained by evidence of either of those three sorts of infringement. So, also, an action may be based on infringement committed during the first term, and on infringement committed during an extended term of any patent, and may be sustained on proof of either or both of those infringements. And several actions may be based on several infringements of the same patent committed at different times by the same infringer.<sup>6</sup>

The only function of actions at law in patent cases is to give damages for past infringement. The principal function of actions in equity, in such cases, is to restrain future infringement by writ of injunction. The form for an action at law in a patent case, as prescribed by the statute, is that of an action of trespass on the case; but as the course of such an action is varied, and the defences, which are pleadable, are very numerous, and most of them

<sup>1</sup> *Humphreys v. Douglass*, 10 Vt., 71, 1838; *Scott v. Watson*, 46 Maine, 362, 1859.

<sup>2</sup> *Bishop's Law of Married Women*, vol. 2, s. 258.

<sup>3</sup> *Green v. Austin*, 22 O. G., 683, 1882.

<sup>4</sup> *Cooley on Torts*, p. 102.

<sup>5</sup> *Avery v. Wilson*, 20 Fed. Rep., 857, 1884.

<sup>6</sup> *Walker on Patents*, c. xvii.

are peculiar to the patent law, full exposition cannot be given in a mere outline like the present treatise. The student is referred to special treatises on this branch of jurisprudence.

The trial of an action at law for infringement of a patent may be a jury, or by a judge, or by a referee. The first of these sorts of trial is the only proper one, except in cases where both parties agree to substitute one of the others. Cases of the kind may be tried by the judge where the parties file with the clerk a stipulation in writing waiving a jury ; and trial by a referee appointed by the court, with the consent of both parties, is a mode of trial fully warranted by law. Trial by jury must, in the absence of contrary consent by the parties, be a jury of twelve men. Unanimity is necessary to a verdict of a jury in a federal court, even in California or Nevada ; though the statutes of those States provide, that in their courts a legal verdict may be found when three-fourths of the members of a jury agree. It is true that unanimity was not necessary to the verdicts of juries in England until after the reign of Edward the First,<sup>1</sup> and that it was never required in Scotland.<sup>2</sup> But no law providing for any other kind of trial by jury can be enforced in a United States court.

The generic measure of damages incurred by infringement of a patent is the pecuniary injury which the plaintiff has sustained,<sup>3</sup> sometimes called "plaintiff's loss," which may have been by failure, in consequence of the infringement, to have acquired a just and deserved gain.<sup>4</sup> Established royalties are specific measures of damages, but established royalties in one case are not always a measure for another ; neither is money paid for infringement already committed a measure of damages in another case. While no established royalty is applicable as a measure of damages, those damages may sometimes be ascertained by finding what the plaintiff would have derived from his patent if the defendant had not infringed, but which he failed to realize because of the invasion of his rights. Damages for infringement by making without unlaw-

<sup>1</sup> Bracton, Liber iv., c. 19 ; Fleta, Liber iv., c. 9 ; Britton, Liber ii., c. 21.

<sup>2</sup> Barrington on the Statutes, c. 29, p. 20 ; 17 and 18 Victoria, c. 59 ; 22 and 23 Victoria, c. 7 ; 31 and 32 Victoria, c. 100, s. 48.

<sup>3</sup> Goodyear v. Bishop, 2 Fisher, 153, 1861 ; Graham v. Mfg. Co., 24 Fed. Rep., 643, 1881.

<sup>4</sup> Hobbie v. Smith, 27 Fed. Rep., 662, 1886.

fully selling or using should be nominal only,<sup>1</sup> unless there is an established royalty for such making, or unless such making is followed by using or selling in a foreign country, or is followed by using or selling in this country after the expiration of the patent. The evidence of damages must be reasonably definite, in order to justify a jury in finding a verdict for more than a nominal amount.<sup>2</sup> Remote consequential damages cannot be embodied in a verdict for infringement.<sup>3</sup> Exemplary damages for infringement cannot lawfully be given by a jury.<sup>4</sup> Increased damages may be awarded by a court where it is necessary to prevent an infringer from profiting from his own wrong. Actual damages are not affected by the infringement being unintended.<sup>5</sup> Counsel fees or other expenses incident to litigation cannot be included in a verdict for actual damages.<sup>6</sup> Interest should be allowed on royalties from the time those royalties ought to have been paid in all cases where a royalty is the measure of the plaintiff's damages.<sup>7</sup> Equity jurisdiction is conferred upon the same courts that have by statute powers at law in patent cases. It may assess and decree damages. Specific requisites of the complaint and defence are set forth at length in special works on practice in patent cases. A bill of revivor is the proper means of reviving and continuing an action in equity for infringement of a patent, which has abated by reason of the death of one or more of the parties thereto.<sup>8</sup> The hearing of an action in equity for infringement of a patent may take place before one of the judges of the court sitting alone or before several judges sitting together, or before a judge and jury, or before a master in chancery.<sup>9</sup> An interlocutory hearing by a judge, in a patent case, in one which occurs after evidence as to the validity of the patent and its infringement and before reference of the case to a master to take and state an account of profits and damages. The final hearing, which

<sup>1</sup> *Whittemore v. Cutter*, 1 Gallison, 483, 1813; *Carter v. Baker*, 4 Fisher, 419, 1871.

<sup>2</sup> *Creamer v. Bowers*, 35 Fed. Rep., 208, 1888.

<sup>3</sup> *Carter v. Baker*, 4 Fisher, 421, 1871.

<sup>4</sup> *Russel v. Place*, 5 Fisher, 134, 1871.

<sup>5</sup> *Emerson v. Simm*, 6 Fisher, 281, 1873.

<sup>6</sup> *Holbrook v. Small*, 3 Bann. & Ard., 626, 1878.

<sup>7</sup> *Locomotive Safety Truck Co. v. Pa. R. R. Co.*, 2 Fed. Rep., 682, 1880.

<sup>8</sup> *Kirk v. DuBois*, 28 Fed. Rep., 460, 1886.

<sup>9</sup> *Parker v. Hatfield*, 4 McLean, 61, 1845.



occurs after the master has taken that account and filed his report, generally involves nothing but the correctness of that report. The preliminary hearing occurs when a preliminary injunction is applied for. The interlocutory hearing is generally the pivotal point of a litigation. Where it results in success of the defendant and consequent dismissal of the bill, it becomes a final hearing. Testimony in an action in equity for infringements of patents is taken wholly by depositions in writing, except in a few districts where, in pursuance of local rules of court, it may, by consent of both parties, be taken orally in open court. A jury of not less than five nor more than twelve persons may be impanelled by any United States circuit court, when sitting in equity for the trial of a patent cause, for the purpose of submitting to them such questions of fact in the case as the court shall deem it expedient to submit, and the verdict of such a jury is treated in the same manner and with the same effect as in the case of issues sent from chancery to a court of law and returned with such findings. Therefore such a verdict is only advisory, and never conclusive upon the court, but the judge generally enters a decree in accordance with the verdict. A new trial, in such a case, is granted or refused as the judge thinks the verdict was right or was wrong, and without special regard to any errors or freedom from errors which characterized the admission or rejection of evidence on the trial, or the instructions which were given, or those which were refused by the judge. Where a new trial is refused and a decree is entered in accordance with the verdict, if the defeated party would take the case to the supreme court for review, he must do so on appeal from the decree, and not upon a writ of error as from a judgment upon a verdict in an action at law. An interlocutory decree in an equity patent case is a decree which adjudges that the patent sued upon is valid, and that the defendant has infringed it; and that a master in chancery be directed to take and report an account of the profits which the defendant realized from that infringement, and of the damages which the complainant sustained by reason thereof; and sometimes that the defendant be permanently enjoined from further infringement. There may of course be a petition for re-hearing before the end of the term at which the final decree is entered and recorded; but not after that<sup>1</sup> unless the case is one which cannot be appealed

<sup>1</sup> *Barker v. Stowe*, 4 Bann. & Ard., 485, 1879.

to the supreme court, in which event it may be admitted before the end of the next succeeding term. A re-hearing on account of newly-discovered evidence must be petitioned for under oath as soon as possible after its discovery.<sup>1</sup> An appeal to the supreme court is demandable from every final decree in cases touching patent rights, provided it is taken within two years after the entry of the decree.<sup>2</sup> But in order to operate as a *supersedeas*, and thus stay execution, an appeal must be taken within sixty days after the rendition of the decree; and indeed an execution may be issued, if an appeal is not taken, within ten days after such a rendition.<sup>3</sup> But in the latter case, a *supersedeas* afterwards obtained will prevent further proceedings under the execution, though it will not interfere with what has already been done.<sup>4</sup> The time within which appeals may be taken, may properly be held to begin either when the case is finally decided, or when the formal decree is signed by the judge and filed with the clerk of the court.<sup>5</sup> When an appeal operates as a *supersedeas* it so operates only as against the money recovery provided for in the decree, and not as against that part of the decree which directs the payment of the master's fees,<sup>6</sup> nor as against that part which directs an injunction to issue;<sup>7</sup> but the judge who enters a decree granting an injunction has discretionary power to suspend or modify the same pending an appeal. On the hearing of an appeal in the supreme court, the decree may generally be attacked upon any ground except that the court below refused to set aside a decree *pro confesso*,<sup>8</sup> or refused to allow the appellant to retract an admission which he had made in his pleadings,<sup>9</sup> or rendered any other decision which belonged to the judicial discretion of the court to make, or that there was error made by a master in chancery in taking an account of profits or damages, unless that error was brought before the court below for correction, by means of a proper exception to the master's report.<sup>10</sup>

<sup>1</sup> Blandy v. Griffith, 6 Fisher, 435, 1873.

<sup>2</sup> Rev. Statutes, s. 1008.

<sup>3</sup> Rev. Stat., s. 1012 and 1007.

<sup>4</sup> Board of Commissioners v. Gorman, 19 Wallace, 663, 1873.

<sup>5</sup> Silsby v. Foote, 20 Howard, 290, 1857.

<sup>6</sup> Myers v. Dunbar, 1 Bann. & Ard., 565, 1874.

<sup>7</sup> Whitney v. Mowry, 3 Fisher, 175, 1867.

<sup>8</sup> Dean v. Mason, 20 Howard, 198, 1857.

<sup>9</sup> Jones v. Morehead, 1 Wallace, 155, 1863.

<sup>10</sup> Kinsman v. Parkhurst, 18 Howard, 289, 1855.

Where a decree is reversed and remanded for further proceedings, and a second decree is entered by the court below after those proceedings are taken, and an appeal is taken from the second decree, that decree cannot be assailed on account of any errors that occurred prior to the former decree.<sup>1</sup> No decree can be attacked by the appellee on the appellant's appeal. Where either party to a decree intends to ask the supreme court to direct it to be altered, he must appeal to that tribunal whether the other party appeals or not.<sup>2</sup> Where both parties appeal, both appeals are heard together in the supreme court, and the complainant in the court below is entitled to open and close the argument.<sup>3</sup> A decree may also be attacked by an appellant on several grounds upon which it may not have been resisted in the court below. Non-jurisdiction of equity falls in this category,<sup>4</sup> and so does want of invention, when that want results from facts of which the court will take judicial notice.<sup>5</sup> After the Supreme Court has heard an appeal, it may affirm the decree, reverse it or modify it, or remand the case to the court below for further proceedings. Where it reverses the decree, it generally does so at the appellee's costs, so that the court below, when it receives the mandate, will have nothing to do but to tax those costs and enter a decree therefore, and from such a decree there is no appeal.<sup>6</sup> When it modifies the decree, it may do so in either of several respects. For example, it may change a decree which was entered for the appellant with costs to one without costs, and in that event it will require the appellee to pay his own costs in the supreme court.<sup>7</sup> It may also change the amount of the decree instead of remanding the case to the court below for recomputation.<sup>8</sup> Where it remands a case for further proceedings, the proceedings prescribed may even extend to a trial at law, or by a jury in equity, of the questions of fact involved in the case.<sup>9</sup> A certificate of division of

<sup>1</sup> *Himely v. Rose*, 5 Cranch, 313, 1809; *The Santa Maria*, 10 Wheaton, 431, 1825; *American Ins. Co. v. Canter*, 1 Peters, 511, 1828; *Corning v. Troy Iron and Nail Factory*, 15 Howard, 451, 1853.

<sup>2</sup> *Corning v. Troy Iron and Nail Factory*, 15 Howard, 451, 1853.

<sup>3</sup> Rules of the Supreme Court of the U. S., Rule 22.

<sup>4</sup> *Hipp v. Babin*, 19 Howard, 271, 1856.

<sup>5</sup> *Brown v. Piper*, 91 U. S., 41, 1875.

<sup>6</sup> *Elastic Fabrics Co. v. Smith*, 100 U. S., 111, 1879.

<sup>7</sup> *O'Reilly v. Morse*, 15 Howard, 121, 1853.

<sup>8</sup> *Parker v. Booth*, 102 U. S., 106, 1880.

<sup>9</sup> *Cochrane v. Deener*, 94 U. S., 784, 1876.

opinion is a means of taking questions of law to the supreme court, where those questions arise in a case heard by two judges in the court below, and where those judges disagree about their proper solution.<sup>1</sup> No question of infringement or other question of fact can be taken to the Supreme Court in this method,<sup>2</sup> and such a certificate must state the precise points of the law which are involved, or the case will be remanded without an answer.<sup>3</sup> A preliminary injunction is one which is granted after the filing of the bill, and before the case is ready for an interlocutory hearing. A bill of complaint, in order to lay a foundation for a preliminary injunction, must state the particular prior adjudication or acquiescence upon which the presumption of validity of the patent is based,<sup>4</sup> and must contain a specific prayer for that relief, and for the proper writ by means of which that relief may be enforced.<sup>5</sup> Due notice of a motion for a preliminary injunction must be served on the party sought to be enjoined from infringing a patent before that motion will be heard by the court. A motion for a preliminary injunction is heard in a summary way on *ex parte* affidavits.<sup>6</sup> The complainant's affidavits in chief must show all the facts which are necessary to entitle him *prima facie* to such an injunction.<sup>7</sup> The defendant's affidavits must state all the facts upon which he bases his defence on the motion, and if those statements are by way of traverse, no further affidavits are admitted on the hearing; but if they are by way of confession and avoidance, the complainant is permitted to read affidavits in reply, but to that reply no rejoinder from the defendant is ever allowed.<sup>8</sup> All the affidavits may be made by the parties, or by any other persons; but in either case they must state the facts positively, and not on information and belief, except upon the point that the complainant believes the person upon whose application the patent was granted to have been the first inventor of

<sup>1</sup> R. S., s. 693.

<sup>2</sup> *California Paving Co. v. Molitor*, 113 U. S., 616, 1884.

<sup>3</sup> *Wilson v. Barnum*, 8 Howard, 258, 1850.

<sup>4</sup> *Parker v. Brant*, 1 Fisher, 59, 1850.

<sup>5</sup> *Lewiston Falls Mfg. Co. v. Franklin Co.*, 54 Maine, 402, 1867; *Union Bank v. Kerr*, 2 Maryland Chancery, 460, 1849.

<sup>6</sup> *Grover & Baker Sewing Machine Co. v. Williams*, 2 Fisher, 133, 1860.

<sup>7</sup> *Union Paper Bag Machine Co. v. Binney*, 5 Fisher, 167, 1871.

<sup>8</sup> *Day v. Car-Spring Co.*, 3 Blatch., 154, 1854; *Rogers v. Abbot*, 4 Washington, 514, 1825.

the invention for which it was issued.<sup>1</sup> A motion to dissolve a preliminary injunction may be made at any time upon reasonable notice to the complainant's solicitor. A temporary restraining order may be made by the court where there appears to be danger of irreparable injury from delay, whenever notice is given of a motion for a preliminary injunction; and such an order may be granted, with or without security, in the discretion of the court, and will continue in force until the motion is decided.

An adjudication in another case, in order to furnish a suitable foundation for a right to a preliminary injunction, must have resulted in favor of the patent in a regular hearing in equity, or on the trial of an action at law. A decree *pro confesso* entered in a case, raises a sufficient presumption of the validity of the patent, to support a right to a preliminary injunction in that case, but there is no ground for giving such a decree such an operation in any case against another defendant. A consent decree is one which is entered by the consent of the defendant, at some stage of the case after the filing of the answer, and before the judge has decided the case on its merits.<sup>2</sup> An interference decision of the Patent Office raises a sufficient presumption of validity to furnish a foundation for a preliminary injunction, where the defendant is the person or the legal representative or assignee of the person, who was defeated in the interference, and where he denies the validity of the patent on no other ground than that the interference decision was wrong.<sup>3</sup> A permanent injunction follows a decision in favor of the complainant on the interlocutory hearing of a patent case, refused or being unless some special reason exists for its being postponed till after the master's report, or being suspended pending an appeal,<sup>4</sup> or it may be dissolved. An attachment will issue to bring an enjoined defendant before the court for punishment, whenever the complainant institutes proper proceedings therefor, and proves that the defendant was promptly served with a writ of injunction, and that the writ contained a concise description of the particular thing, all

<sup>1</sup> *Young v. Lippman*, 9 Blatch., 277, 1872.

<sup>2</sup> *Walker on Patents*, 2d edition, 492.

<sup>3</sup> *Pentlarge v. Beeston*, 14 Blatch., 354, 1877; *Holliday v. Pickhardt*, 12 Fed. Rep., 147, 1882.

<sup>4</sup> *Potter v. Mack*, 3 Fisher, 430, 1868; *Rumford Chemical Works v. Hecker*, 2 Bann. & Ard., 388, 1876.

specimens of which it forbade the defendant to make, use, or sell, and that the defendant did make, or use, or sell, or did cause to be made, used or sold, a specimen of that thing or of a thing clearly the same, after having been served with that writ. The penalty for a violation of injunction depends upon the circumstances of the particular case at bar. Where disobedience of an injunction is excuseless and defiant, the penalty may be a reasonable fine and reasonable imprisonment. The generic rule for ascertaining the amount of the profits recoverable in equity for the infringement of a patent, is that of treating the infringer as though he were a trustee for the patentee in respect of the profits which he realized from his infringement.<sup>1</sup>

*Trade-mark* is a common law right, which grows out of the employment by the party using it, of some particular mark employed in association with things in trade. The prerogative to permit registration of a trade-mark is a creation by statute founded upon a clause in the Constitution, as follows:

The Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

The statute referred to is the trade-mark law of March 3, 1881, which was enacted to supply a trade-mark law for the law enacted July 8, 1870, supplemented by the penal act of 1876, and declared invalid by the Supreme Court,<sup>2</sup> upon the ground that it did not, on its face, or from its essential nature, bear evidence that it referred to the only provision in the Constitution upon which it could properly be founded, the court saying:

"When, therefore, Congress undertakes to enact a law which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the statute, or from its essential nature, that it is a regulation of commerce with foreign nations, among the several States, or with the Indian tribes. If it is not so limited it is in excess of the power of Congress. If its main purpose be to establish a regulation applicable to all trades, to commerce at all points, especially if it is apparent that it is designed

<sup>1</sup> *Root v. Railway Co.*, 105 U. S., 214, 1881; *Tilghman v. Proctor*, 125 U. S., 148, 1888.

<sup>2</sup> *U. S. v. Steffens*; *U. S. v. Witteman*, 16 O. G., 999.

to govern the commerce wholly between citizens of the same State, it is obviously the exercise of a power not confided to Congress."

The act of 1876 has been held to have fallen with the act of 1870, by a circuit court,<sup>1</sup> upon the ground that it was included by the supreme court in the decision of *U. S. v. Steffens*, and upon further grounds that a penal statute denouncing trespass upon a merely statutory right, when there is in existence no such statutory right, and when, whether there shall ever be depends upon the will of succeeding law-making powers cannot remain suspended, and the act of 1881 did not, in express terms, vivify the act of 1876.

Patents and copyrights are then based upon one clause of the Constitution, and right to trade-mark registration upon another; and the singular fact exists that applications for patent and the registration of trade marks are together under one official, and applications for entry of copyrights are under another.

Trade-mark falls under the general head of equity, inasmuch as the fraudulent use of a trade-mark will be restrained by injunction, the ground of relief being that it is not only an invasion of the rights of property, but equity will not permit a party to practice a fraud by availing himself of another's reputation and deceiving the public.

*Trade-mark* is the mere association with some particular class of merchandise of an arbitrary—that is, non-descriptive—expression, word, name, letter, device, figure, mark or symbol, whether newly created or not, indicating the origin and ownership or emanation of particular merchandise, serving to distinguish such from like merchandise of others, and enabling the public immediately to recognize the particular manufacture, or product, or substance, or to know where to obtain it. It is the adoption, in the sense of *use*, of some arbitrary expression, character, or device in connection with something, the subject of trade.

The right of property in a trade-mark is an original right, neither created nor controlled by any legislative enactment, but existing at common law, independent of all statutory provisions, which (recognizing its existence and the great importance of its protection beyond that afforded it by courts of civil jurisdiction) inflict penalties upon its violation.

<sup>1</sup> *U. S. v. Koch*, 49 O. G., 891.

The words "*prints*" and "*labels*" are construed as synonymous, and are defined as any devise, picture, word or words, figure or figures (not a trade-mark) impressed or stamped directly upon the articles of manufacture, or upon a slip or piece of paper, or other material, to be attached in any manner to manufactured articles, or to bottles, boxes and packages containing them, to indicate the contents of the packages, the name of the manufacturer or the place of manufacture, the quality of goods, directions for use, etc.

The chief differences between *trade-mark* matter and *label* matter are that trade-mark matter is property at common law, label matter is not; trade-mark matter must be adopted *and used* before a right attaches or vests, whereas from the use of label matter no right attaches.

A *trade-mark registration* is not a grant; neither is it a contract. It is a mere record permitted to an owner of a trade-mark, that has been used in commerce with foreign nations or Indian tribes, who is domiciled in the United States, or located in some foreign country which affords similar privileges to our citizens, of which record a certificate is given by the Commissioner of Patents. It is true that the registration is *prima facie* evidence of ownership, but in this it is only like other record. In *ex parte* Lyon, Dupuy & Co.<sup>1</sup> it was held that no applicant may register a trade-mark unless he can establish, first, that he has the right to use it and no one else has; second, that it is not identical with the registered or known trade-mark of another person, and beyond this he must show that he is using the trade-mark which he so owns in commerce with foreign nations or Indian tribes; that the statute does not provide that the trade-mark sought to be registered shall be used in foreign commerce; but it does not in terms provide, nor in fair intendment convey the idea, that a party may acquire the right to use somebody else's trade-mark merely by using it in such trade; that where the records of the patent office disclose that certain parties registered a trade-mark under the law of 1870, that such trade-mark was their property, that they had been using it in this country for ten years next preceding the date of their application for registration, and there is no evidence that they have ever abandoned such trade-mark, *held* that section 3 of the act of

<sup>1</sup> *Ex parte*, Lyon, Dupuy & Co., 28 O. G., 191.



1881 and the spirit of the whole statutes authorizes the patent office to take notice of the facts recited in said records in determining the "presumptive lawfulness of claims to the alleged trade-mark," by subsequent application for registration, and the examiner was justified in rejecting the application for registration on the facts disclosed in said record.

*A print or label registration*, whereof a certificate is given by the Commissioner of Patents, is in the nature of a grant to the owner or owners of any new print or label of the exclusive right to the same. But no such print or label can be registered unless it properly belongs to an article of commerce, and is as above defined; nor can the same be registered as a print or label when it amounts to a lawful trade-mark, or when its use in connection with the article to which it is applied is arbitrary or fanciful. The benefits of the act authorizing the registration of prints or labels seems to have been confined originally to citizens or residents of the United States, but appear to be extended to British subjects and the subjects of the German empire by existing treaties.

Registration of a trade-mark may be obtained by any person, firm, or corporation domiciled in the United States or located in any foreign country which, by treaty, convention, or law, affords similar privileges to citizens of the United States, and who is entitled to the exclusive use of any trade-mark and uses the same in commerce with foreign nations or with Indian tribes; or any citizen or resident of this country wishing the protection of his trade-mark in any foreign country the laws of which require registration in the United States as a condition precedent, every applicant for registration of a trade-mark must cause to be recorded in the Patent Office: The name, domicile, and place of business or location of the firm or corporation desiring the protection of the trade-mark, and the residence and citizenship of individual applicants. The class of merchandise and the particular description of goods comprised in such class to which the trade-mark has been appropriated. A description of the trade-mark itself, with fac-similes thereof, and the mode in which it has been applied and used. The length of time during which the trade-mark has been used by the applicant on the class of goods described. A fee of \$25 which is the entire fee, is required on filing each application, except in the cases hereinafter named. An application for the registration of a trade-mark

will consist of a statement or specification, a declaration or oath, and the fac-simile with duplicates thereof. The statement and declaration should be written on one side of the paper only. These should be preceded by a brief letter of advice requesting registration and signed by the applicant. The statement should announce the full name, citizenship, domicile, residence, and place of business of the applicant (or, if the applicant be a corporation, under the laws of what State or nation incorporated,) with a full and clear specification of the trade-mark, particularly discriminating between its essential and non-essential features. It should also state from what time the trade-mark has been used by the applicant, the class of merchandise, and the particular goods comprised in such class to which the trade-mark is appropriated, and the manner in which the trade-mark has been applied to the goods. (See form 16.) The declaration should be in the form of an oath by the person, or by a member of the firm, or by an officer of the corporation making the application, to the effect that the party has at the time of filing his application a right to the use of the trade-mark described in the statement; that no other person, firm, or corporation has a right to such use, either in the identical form or in such near resemblance thereto as might be calculated to deceive; that such trade-mark is used in lawful commerce with foreign nations or Indian tribes, one or more of which should be particularly named; and that it is truly represented in the fac-simile presented for registry. (See form 18.) This oath may be taken within the United States before a notary public, justice of the peace, or the judge or clerk of any court of record. In any foreign country it may be taken before the secretary of a legation or consular officer of the United States, or before any person duly qualified by the laws of the country to administer oaths, whose official character shall be certified by a representative of the United States having an official seal. Where the trade-mark can be represented by a fac-simile which conforms to the rules for drawings of mechanical patents, such a drawing may be furnished by applicant, and the additional copies will be produced by the photo-lithographic process at the expense of the office. Or the applicant may furnish one fac-simile of the trade-mark, mounted on a card 10 by 15 inches in size, and ten additional copies upon flexible paper, not mounted; but in all cases the sheet containing the mounted fac-simile or the drawing

must be signed by the applicant or his authorized attorney, and authenticated by two witnesses. All applications for registration are considered in the first instance by the trade-mark examiner. An adverse decision by such examiner upon the applicant's right to registration will be reviewed by the Commissioner in person upon petition without fee. No trade-mark will be registered unless it shall be made to appear that the same is used as such by the applicant in commerce between the United States and some foreign nation or Indian tribe, or is within the provisions of a treaty, convention, or declaration with a foreign power, nor which is merely the name of the applicant, nor which is identical with a known or registered trade-mark owned by another and appropriated to the same class of merchandise, or which so nearly resembles some other person's lawful trade-mark as to be likely to cause confusion in the mind of the public or to deceive purchasers. The statement may be amended to correct informalities or to avoid objections made by the office, or for other reasons arising in the course of examination; but no amendments will be admitted unless warranted by something in the statement or fac-simile as originally filed. In respect to amendments the established rules in regard to applications for patents will be observed. The declaration cannot be amended. If that filed with the application is faulty or defective, a substitute declaration may be filed. In case of conflicting applications for registration, or in any dispute as to the right to use which may arise between an applicant and a prior registrant, the office will declare an interference, in order that the parties may have an opportunity to prove priority of adoption or right; and the proceedings on such interference will follow, as nearly as practicable, the practice in interferences upon applications for patents; but each applicant and registrant will be held to the date of adoption alleged in the statement filed with his application. On the petition of any party dissatisfied with the decision of the examiner of interferences the case will be reviewed by the Commissioner without fee. When these requirements have been complied with, and the office has adjudged the trade-mark lawfully registrable, a certificate will be issued by the Commissioner, under seal of the Interior Department, to the effect that the applicant has complied with the law, and that he is entitled to the protection of his trade-mark in such case made and provided. Attached to the

certificate will be a fac-simile of the trade-mark and a printed copy of the statement and declaration. The protection for such trade-mark will remain in force for thirty years, and may, upon the payment of a second fee, be renewed for thirty years longer, except in cases where such trade-mark is claimed for and applied to articles not manufactured in this country, and in which it receives protection under the laws of any foreign country for a shorter period, in which case it will cease to have force in this country, by virtue of the registration, at the same time that the trade-mark ceases to be exclusive property elsewhere. The right to the use of any trade-mark is assignable by an instrument in writing, and such assignment of a registered trade-mark must be recorded in the Patent Office within sixty days after its execution, in default of which it may be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice. No particular form of assignment or conveyance is prescribed, but the trade-mark must be identified by the certificate number. Owners of trade-marks for which protection has been sought by registering them in the Patent Office under the act of July 8, 1870 (declared unconstitutional by the supreme court of the United States), may register the same for the same goods, without fee, on compliance with the foregoing requirements. With each application of this character a specific reference to the date and number of the former certificate is required.

Applicants whose cases were filed under the Act of 1870, either prior to or since the decision of the Supreme Court declaring it unconstitutional, which are now pending before the office, are advised to prepare applications in conformity with the law and foregoing rules. On the receipt of such an application, referring to the date of the one formerly filed, all fees paid thereon will be duly applied. Those who have paid only \$10 as a first fee are advised that the law does not provide for a division of the legal fee of \$25, and that the remainder of the entire fee is required before the application can be entertained. To entitle the owner of a print or label to register the same in this office, it is necessary that five copies of the same be filed, one of which copies shall be certified under the seal of the Commissioner of Patents, and returned to the registrant. The certificate of such registration will continue in force for twenty-eight years. It has been held in a United States circuit court that the

use of a label in the sale of the merchandise it is intended to designate prior to the deposit of such label in the Patent Office, amounts to a publication thereof (*Marsh et al. v. Warren et al.*, XIV. O. G., 678). Since, in the same decision, the court held that in a suit for infringement of a registered label the bill must aver that the title and label were deposited before publication, it is evident that any such use will vitiate a registration subsequently effected. The fee for registration of a print or label is six dollars, to be paid in the same manner as fees for patents.

The benefits of this act seem to have been originally confined to citizens or residents of the United States; but are extended by existing treaties to British, German, Italian and Belgian subjects.

It is held that a registered label is, like a copyright, assignable by an instrument in writing. And such an instrument will be recorded in the Patent Office. Such assignment should be presented for record within sixty days of its execution, otherwise it is liable to be held void as against any subsequent purchaser or mortgagee for a valuable consideration without notice.

Original productions of the mind, whether in the form of books, maps, engravings, designs, or other of the manifold manifestations of human thought, expressed by words or symbol, bear no appreciable resemblance to a mere expression, word, name, letter, device, figure, mark or symbol, coupled with and used as a designation of certain merchandise; the former having an existence in the thing itself, in the expression, design, or manifestation, which is the sign of a thing and the form and embodiment of thought, and being protected under the copyright statute.

It was for some time the prevailing and better opinion in England, that authors had an exclusive copyright at common law, as permanent as the property of an estate; and that the statute of 8 Anne, c. 19, protecting by penalties that right for fourteen years, was only an additional sanction, and made in affirmance of the common law. This point came at last to be questioned; became the subject of serious litigation in the Court of King's Bench, and was debated at the bar and upon the bench, with great exertion of talent and very extensive erudition and skill in jurisprudence. It was decided that every author had a common-law right in perpetuity, independent of statute, to the exclusive print-

ing and publishing his original compositions.<sup>1</sup> The court were not unanimous, and a subsequent decision of the House of Lords in *Donaldson v. Becket*, in February, 1774, settled this very litigated question against the opinion of the King's Bench by establishing that the common-law right of action (if any existed) could not be exercised beyond the time limited by the statute of Anne.<sup>2</sup>

The act of Congress is declared not to extend to prohibit the importation or vending, printing or publishing, within the United States, any map, chart or book, musical composition, print or engraving, written, composed, or made by any person not a citizen of the United States, nor resident within the jurisdiction thereof.

The statute of Anne had a provision against the scarcity of editions and exorbitancy of price. The act of Congress has no such provision, and it leaves authors to regulate, in their discretion, the number and price of their books, calculating (and probably very correctly) that the interest an author has in a rapid and extensive sale of his work will be sufficient to keep the price reasonable and the market well supplied.<sup>3</sup>

The act of Congress, though taken generally from the provisions of the statutes of 3 Anne, c. 19, varies from it in several respects. The statute of Anne did not discriminate, as the act of Congress does, between citizens and foreigners, or require any previous residence of the latter, but granted the privilege of copyright to every author of any book.<sup>4</sup> It renewed the copyright at the expiration of the fourteen years, if the author was then living, for another term of fourteen years, without any re-entry and re-publication, as is required with us.

The statute of Anne required not only the title of the book to be entered at Stationers' Hall, but nine copies to be deposited there

<sup>1</sup> *Miller v. Taylor*, 4 Burr., 2303.

<sup>2</sup> *Donaldson v. Becket*, cited in 4 Burr., 2408; 7 Bro. P. C., 88; s. c., *Beckford v. Hood*, 7 T. R., 620.

<sup>3</sup> When the copyright, or the exclusive privilege of printing and selling books for a limited period, was introduced in Spain under Isabella, it was granted, says Mr. Prescott (*History of Ferdinand and Isabella*, ii., 207), in consideration of the grantee selling at a reasonable rate; and foreign books of every description were allowed to be imported into the kingdom free of all duty whatever.

<sup>4</sup> See *D'Almaine v. Boosey*, 1 Y. & Coll., 288.

for the use of the libraries of the two universities and other libraries; and the statute of 54 Geo. III. enlarged the number to eleven copies, by requiring two copies for libraries in the city of Dublin. A statute of Wm. IV. repealed this part of the former act, and reduced the number of deposited copies to five. The law of copyright was again amended by the act of 5 & 6 Vict., c. 45, and, by a clause in the acts of 8 & 9 Vict., c. 93, the absolute prohibition of foreign reprints of copyright books is extended to the British colonial possessions. In the case of splendid and expensive publications, supporting only a few copies, the requirement of deposit of copies is a very heavy tax upon the author. The statute of 8 Geo. II., c. 13, securing the privilege of copyright for twenty-eight years to the inventors of prints and engravings, did not require the deposit of any copies for public uses. The statute of 54 Geo. III., c. 156, greatly improved upon the statute of Anne, and gave to the author at once the full term of twenty-eight years; and if he be living at the end of that period, then for the residue of his life. The statute of 5 & 6 Vict., c. 45, provided still more amply in favor of authors by declaring that every book published in the lifetime of its author shall endure for his natural life, and seven years longer; and if the seven years shall expire before the end of forty-two years from the first publication, the copyrights shall endure for such period of forty-two years.

Under the English statute of 54 Geo. III. the omission to enter the work at Stationers' Hall deprived the author of the penalties given to him for breach of the copyright, and subjected him to certain small forfeitures; and his exclusive copyright still existed, and he might sue for damages on the violation of it.<sup>1</sup>

The act of Congress is not susceptible of that construction, though the omission to *deposit a copy of the book* in the clerk's office, under the act of Congress of 1831, does not deprive the author of his vested copyright, nor of his remedies under the statute. That provision is merely directory. It has been decided in a case of copyright, under the act of Congress of 1790, that after depositing the title of the book in the clerk's office, the exclusive right was vested, and that the publication of the title, and the deposit of a copy of the book in the secretary's office, were acts

<sup>1</sup> Beckford v. Hood, 7 T. R., 620; Stat. 5 & 6 Vict., c. 45, s. p.

merely directory, and constituted no part of the essential requisites for securing the copyright.<sup>1</sup> But under the act of 1802 the publication was held to be essential.<sup>2</sup> And in *Wheaton v. Peters*, 8 Peters, 591, the question of copyright was discussed by counsel with great learning and ability, and a majority of the Supreme Court held that an author had no common-law copyright in his published works; that if such a common-law right ever existed in England, yet there was no common law of the United States on the subject, and there was no evidence or presumption that any such common-law right had ever been introduced or adopted in Pennsylvania, where the controversy in that case arose; and that, as in England, since the statute of 8 Anne, an author's exclusive right of literary property in his published works was confined to the period limited by the statute, so in that case the author's right depended upon the acts of Congress of 1790 and 1802. It was further held that the requirements in the act of 1790, as explained and amended by the act of 1802, to deposit a copy of the title in the clerk's office, and to insert a copy of that record in the title-page of the work, or in the succeeding page, and to publish the same for four weeks in a newspaper, and to deposit a copy of the work, within six months, in the office of the Secretary of State, were all acts essential to the title, and necessary to be performed, to enable the author to claim the protection and benefit of those statutes. The court likewise declared that no reporter had or could have any copyright in the written opinions delivered by the judges of that court. The minority of the court held that authors had a common-law right in their works, which existed independent of the acts of Congress, and under the common law of the several States; and that the statute right and remedy vested upon recording the title-page of the book, and inserting a copy of the act in the page next to the title-page; and that the subsequent notice and deposit were merely directory, according to the decision in *Nichols v. Ruggles*.

M. Renouard, the author of a treatise on patents, has published a dissertation on the rights of authors, in which he contends that authors have not, upon just principles, any perpetual copyright, and are only entitled to the protection and remuneration which statute

<sup>1</sup> *Nichols v. Ruggles*, 8 Day, 145.

<sup>2</sup> *Ewer v. Coxe*, 4 Wash., 487.



law affords. The substance of that dissertation is given in the *American Jurist*, No. 43, for October, 1889; and if the reason and policy upon which the opinion of M. Renouard is founded be not sufficient, we are, nevertheless, satisfied that the protection of copyright in perpetuity, independent of statute provision, as was once contended for in the great case of *Miller v. Taylor*, is visionary and impracticable.

The French law of copyright is founded on the republican decree of July 19, 1793, which gave to authors of writings of all kinds, composers of music, painters and engravers, a right for life in their works, and to their heirs for ten years after their deaths, with strong provisions against the invasion of such literary property. One copy was to be deposited in the national library. The imperial decree of the 5th February, 1810, made some modifications of that law, and gave the right to the author for life, and to his wife, if she survived, for life, and to their children for twenty years; and the right was secured by adequate civil penalties. A number of interesting questions have been discussed and decided in the French tribunals under the above law, and they are reported in the *Répertoire de Jurisprudence*, par Merlin, tit. Contrefaçon, secs. 1-15; and in his *Questions de Droit*, tit. Propriété Littéraire, secs. 1, 2. In the case of *Masson & Besson v. Moutardier & Leclere*, in the latter work, sec. 1, a new edition of the Dictionary of the French Academy, with colorable additions only, was adjudged to be a fraudulent violation of the copyright; and Merlin has preserved his elaborate and eloquent argument in support of literary property. In the case of *Lahante & Bonnemaison v. Sieber*, the question was concerning the rights of foreign authors; and it was decided and settled on appeal in March 10, 1810, that the French assignee of a literary or musical work, not published abroad, acquired in France, after conforming to the usual terms of the French law, *before any publication abroad*, the exclusive copyright under the law of 1793.<sup>1</sup> It is understood to be lawful to publish in France, without the permission of the author, a work already published in a foreign country.<sup>2</sup> The French law is much more liberal in the protection to intellectual productions to authors and their

<sup>1</sup> See *Questions de Droit*, tit. Propriété Littéraire, sec. 2.

<sup>2</sup> *Répertoire*, *ubi supra*, sec. 10.

heirs than either the English or our American law; and it is a curious fact in the history of mankind, that the French National Convention, in July, 1793, should have busied themselves with the project of a law of that kind when the whole republic was at that time in the most violent convulsions; and the combined armies were invading France and besieging Valenciennes; when Paris was one scene of sedition, terror, proscription, imprisonment and judicial massacre, under the forms of the revolutionary tribunal; when the convention had just been mutilated by its own denunciation and imprisonment of the deputies of the Gironde party, and the whole nation was preparing to rise in a mass to expel the invaders. If the production of such a law, at such a crisis, be not resolvable into mere vanity and affectation, then, indeed, we may well say with Mr. Hume, so inconsistent is human nature with itself, and so easy do gentle, pacific and generous sentiments ally both with the most heroic courage and the fiercest barbarity!

There is a disposition in France to enlarge still further the term of an author's property in his works; and the commissioners appointed by the king to frame a new law on the subject, reported, in the summer of 1826, the draft of a law, in which they proposed to give to authors and artists of works of all kinds, property in their works for life, and to their legal representatives for fifty years from their deaths; and copyright in a work to be protected from piracy by representation as well as piracy by publication. But it is understood that the French copyright still rests upon the provisions of 1810, and that the proposed modifications of 1826 did not pass into a law. In Prussia, by an ordinance of the king, in June, 1837, copyright endures for the life of the author, and to his heirs for thirty years after his death. The rapid and piratical reprint in Belgium of French books, as soon as they are out, and the consequent diffusion of them all over France, ruins the value of copyright in France. There is the same evil as respects French Switzerland. Copyright has a fair claim to international protection. In Germany, copyright is perpetual; but it cannot be of much value, for there is no one uniform Germanic legislation on the subject to protect copyright among so many independent states, using a common language. It is said, however, that there is a reciprocal security of copyright by treaty between Prussia and Austria; and by the act of union of the Germanic confederacy of

1815, the diet was directed to make uniform decrees for the protection of copyright. By the Prussian ordinance of June, 1837, the copyright law of that kingdom applies generally to works published in foreign states provided the copyright law of such state applies to and protects works published in the Prussian dominions. So, also, the English statute of 1 & 2 Vict., c. 59, secures to authors, in certain cases, the international copyright, by allowing the queen in council to grant to authors of books, which shall thereafter be published in any foreign country to be specified in the order, the privilege of copyright in the British dominions, for a term not exceeding that granted to British authors, upon entry and deposit of the work with the warehouse keeper of the company of stationers in London. The grant to be upon the condition that British authors have the like protection in the foreign country. The case of Germany shows how important it was in this country that the law of copyright should rest on the broad basis of federal jurisdiction. By the law in Russia, as established in 1828, copyright in books and translations is secured to an author for life, and to his heirs, after his death, for twenty-five years, and no such right can be sold for debt. In May, 1840, a treaty was entered into by the Sardinian and Austrian Lombardy governments, providing for the security of literary property within their respective dominions; and the King of the Two Sicilies, the Grand Duke of Tuscany, and the Dukes of Lucca and Modena, have acceded to the treaty. This is justly deemed a very auspicious event in the history of copyright. The copyright, or right of property in works of science, literature and art, including pictures, statues, drawings, copper-plates and lithographs, appearing within their respective Italian states, is secured to the author and his assigns for his life and for thirty years after his death. If published after his death, it is protected for forty years from the time of publication. Every article of an encyclopædia or periodical work, exceeding three printed sheets, is to be held a separate work, and all allowable extracts are to be confined to three printed pages of the original. In Holland and Belgium, the author is protected in his copyright during his life and to his legal representatives during twenty years after his death.<sup>1</sup>

The difference between *copyright* and *label* is that in the copy-

<sup>1</sup> Kent's Commentaries, vol. 2, pp. 375 and 376, *et seq.*

right act the words "engraving, cut, and print" are applied only to pictorial illustrations or works connected with the fine arts, and matter pertaining to them is entered at the office of the Librarian of Congress; whereas by the word print or label, as employed in the label act, is understood such a label or print as may only be used upon an article of manufacture, and is not of the kind specified in the copyright act, and the Commissioner of Patents is charged with the supervision and control of the entry of registry of such print or label.

A *copyright* is, under our law, the grant to the author or proprietor, if a citizen or resident of the United States, of any book, map, chart, dramatic or musical composition, or engraving, cut, or print, if a work of the fine arts, or photograph or negative thereof, or painting, drawing, chromo, statue, statuary, or of models or designs intended to be perfected as works of the fine arts, his heirs or assignees, for a term of years, extensible upon suitable request, of the exclusive right, the sole liberty of printing, re-printing, publishing, copying, finishing and vending the same, and, in the case of a dramatic composition, of publicly performing or representing, or causing to be performed or represented by others, with all rights of translation or dramatization of works. The Commissioner of Patents has nothing to do with copyright. The Librarian of Congress is charged with all things relating thereto.

To secure a copyright a *printed* copy of the title of the book, map, chart, dramatic or musical composition, engraving, cut, print, photograph, or a description of the painting, drawing, chromo, statue, statuary, or model or design for a work of the fine arts, for which copyright is desired, must be sent by mail or otherwise, *prepaid*, addressed

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Any author may reserve the right to translate or to dramatize his own work. In this case notice should be given by printing the words "Right of translation reserved," or "All rights reserved," below the notice of copyright entry, and notifying the Librarian of Congress of such reservation, to be entered upon the record. The original term of copyright runs for twenty-eight years. *Within six months before* the end of that time, the author or designer, or his widow or children, may secure a renewal for the further term of fourteen years, making forty-two years in all. Applications for renewal must be accompanied by explicit statement of ownership, in the case of the author, or of relationship, in the case of his heirs, and must state definitely the date and place of entry of the original copyright. The time within which any work entered for

copyright may be issued from the press is not limited by any law or regulation, but depends upon the discretion of the proprietor. A copyright may be secured for a projected work as well as for a completed one. A copyright is assignable in law by any instrument of writing, but such assignment must be recorded in the office of the Librarian of Congress within sixty days from its date. The fee for this record and certificate is one dollar, and for a certified copy of any record of assignment, one dollar. A copy of the record (or duplicate certificate) of any copyright entry will be furnished, under seal, at the rate of fifty cents each. In the case of books published in more than one volume, or of periodicals published in numbers, or of engravings, photographs, or other articles published with variations, a copyright is to be entered for each volume or part of a book, or number of a periodical, or variety, as to style, title, or inscription of any other article. To secure a copyright for a painting, statue, or model or design intended to be perfected as a work of the fine arts, so as to prevent infringement by copying, engraving, or vending such design, a definite description must accompany the application for copyright, and a photograph of the same, at least as large as "cabinet size," should be mailed to the Librarian of Congress within ten days from the completion of the work or design. Copyrights cannot be granted upon trade-marks, nor upon mere names of companies or articles, nor upon prints or labels intended to be used with any article of manufacture. Citizens or residents of the United States only are entitled to copyright. Every applicant for a copyright should state distinctly the full name and residence of the claimant, and whether the right is claimed as author, designer, or proprietor. No affidavit or formal application is required.

At the time of the enactment of the trade-mark law of July 8, 1870, it was the custom of the Librarian of Congress to enter, under the provision of the copyright law, labels and prints of commerce, many of which embraced legal trade-marks. Notwithstanding the existence of a separate statute in 1870 for the registration of trade-marks, the Librarian of Congress, in entering labels and prints of commerce, gave a semblance of protection to many trade-marks, of which the labels and prints entered by him were the mere vehicles. To remedy this difficulty was the object of the amendment to the copyright law of June 18, 1874, referred to

herein as the act for the registration of prints and labels. By this amendatory act the Librarian of Congress is restricted, in the registry of copyright matter, to pictorial illustrations or works connected with the fine arts, and is prohibited from registering labels or prints designed to be used for any other articles of manufacture, *i.e.*, articles of commerce. These are now registrable at the Patent Office; while matter properly coming within the definition of copyright subject matter, as contained in the act of June 18, 1874, is registrable at the office of the Librarian of Congress.

Since the foregoing was put in type a new copyright law, approved March 3, 1891, and to go into effect July 1, 1891, changes the preceding act in the following particulars:

Section 4952, R. S., is amended to extend the right of obtainment of copyrights to any author, inventor, designer or proprietor, irrespective of nationality, and to extend the exclusive right of translation or dramatization to assigns.

Section 4954, R. S., is amended to extend the right of continuation of the copyright to the widow or children of the author, inventor, designer or proprietor, irrespective of nationality.

Section 4956, R. S., as amended provides that no person shall be entitled to a copyright unless he shall deliver, before publication in this or any foreign country, or deposit in the mail within the United States, a printed copy of the title of the book, map, chart, dramatic or musical composition, etc.; and further provides that two copies of the copyright matter (as required in the original section) shall be delivered at the office of the Librarian of Congress or be deposited in the mails within the United States, at "a day not later than the day of publication thereof in this or any foreign country," instead of within ten days from the publication in the United States, with the provision that the two copies to be deposited with the Librarian of Congress shall be printed or produced from type set within the United States: and prohibits importation of copyrighted matter during the existence of the United States copyright.

Section 4958, R. S., relating to the fees is changed so that the third clause makes the cost of recording and certifying any instrument of writing for the assignment of a copyright, one dollar, for the entire assignment, instead of fifteen cents per hundred words; and the fourth clause makes the cost of every copy of an assignment one dollar for the entire assignment, instead of ten cents per

hundred words. In the same section, the charge for recording the title or description of the copyright of any person not a citizen or resident of the United States, is made one dollar, as against fifty cents for a citizen or resident, this money to be applied to defray the expense of publication of a weekly list or catalogue of all title-entries.

Section 4963, R. S., is amended to include dramatic publications.

Sections 4964 and 4965, R. S., are amended to protect authors against translation and dramatization as well as against printing, publication, and importation of their works.

Section 4967, R. S., is amended by striking out the words "if such author or proprietor is a citizen of the United States or resident therein."

Section 4971, R. S., is stricken out.

For the purpose of this act each volume of a book in two or more volumes, when such volumes are published separately and the first one shall not have been issued before July 1, 1891, and each number of a periodical shall be considered an independent publication, subject to the form of copyrighting as above; and this act only applies to a citizen or subject of a foreign state or nation when such foreign state or nation permits to citizens of the United States the benefit of copyright on substantially the same basis as its own citizens; or when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States may, at its pleasure, become a party to such agreement, the existence of either of these conditions to be determined by the President of the United States by proclamation from time to time.



## PART IV. OF PERSONAL ESTATE GENERALLY.

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### CHAPTER I.

#### OF SETTLEMENTS OF PERSONAL PROPERTY.

PERSONAL property is capable of being settled, but not in the same manner as land. Land, being held by estates, is settled by means of life estates being given to some persons, with estates in remainder in tail and in fee simple to others. But personal property, as we have already observed,<sup>1</sup> is essentially the subject of absolute ownership. The settlement of such property, by the creation of estates in it, cannot therefore be accomplished. And there is a striking difference in many cases between the effect of the same limitation, according as it may be applied to real or to personal property.

As there can be no estate in personal property, it follows that there can be no such thing as an estate for life in such property in the strict meaning of the phrase. Thus, if any chattel, whether real or personal, be assigned to A. for his life, A. will at once become entitled in law to the whole. By the assignment, the property in the chattel passes to him, and the law knows nothing of a reversion in such chattel remaining in the assignor. And this is the case even though the chattel be a term of years of such length (for instance 1000 years) that A. could not possibly live so long.<sup>2</sup> The term is considered in law as an indivisible chattel, and consequently incapable of any such modification of ownership as is contained in a life estate.

An apparent exception to the above rule has long been established in the case of a bequest by will of a term of years to a person for

<sup>1</sup> See *ante*, pp. 33-35.  
( 278 )

<sup>2</sup> 2 Prest. Abs. 5.

his life: in this case the intention of the testator is carried into effect by the application of a doctrine similar to that of executory devises of real estates.<sup>1</sup> The whole term of years is considered as vesting in the legatee for life, in the same manner as under an assignment by deed; but on his decease the term is held to shift away from him, and to vest, by way of *executory bequest*, in the person to be next entitled.<sup>2</sup> Accordingly, if a term of years be bequeathed to A. for his life, and after his decease to B., A. will have, during his life, the whole term vested in him, and B. will have no vested estate, but a mere *possibility*, as it is termed,<sup>3</sup> until after the decease of A.; and this possibility, like the possibility of obtaining a real estate, was formerly inalienable at law unless by will,<sup>4</sup> though capable of assignment in equity.<sup>5</sup> If no such assignment is made, B. will become, on the decease of A., possessed of the whole term, which will then shift to B. by virtue of the executory bequest in his favor. The mere circumstance, indeed, of the term being bequeathed to A. for his life only, will operate to shift away the term on his decease,<sup>6</sup> independently of the bequest to B.; so that, if there had been no bequest over to B., the interest of A. would continue only during his life, and the residue of the term would then remain part of the undisposed of property of the testator. It may, however, be doubted whether the doctrine of executory bequests is applicable in law to any other chattels than chattels real.<sup>7</sup>

<sup>1</sup> See Williams' Real Property, 249, 2d ed.; 256, 3d ed.; 259, 4th ed.; 270, 5th ed.; 284, 6th ed.; 292, 7th ed.; 301, 8th ed.; 6th Am. ed., 240.

<sup>2</sup> Matthew Manning's Case, 8 Rep., 95; Lampet's Case, 10 Rep., 47.

<sup>3</sup> See Williams' Real Property, 223, 2d ed.; 230, 3d ed.; 231, 4th ed.; 240, 5th ed.; 250, 6th ed.; 256, 7th ed.; 267, 8th ed.; 6th Am. ed., 241-242.

<sup>4</sup> Shep. Touch., 230.

<sup>5</sup> Fearn, Cont. Rem., 548.

<sup>6</sup> Eyres v. Faulkland, 1 Salk., 231; Ker v. Lord Dungannon, 1 Dru. & War., 509, 528.

<sup>7</sup> Fearn, Cont. Rem., 413. See, however, 1 Jarm. Wills, 793; 747, 2d ed.; Hoare v. Parker, 2 Term Rep., 376.

But see Cooper v. Cooper, 2 Brevard, 355; Griggs v. Dodge, 2 Day, 28; Taber v. Packwood, *Ibid.*, 52; Nevison *et al.* v. Taylor, Adm., 3 Halst., 43; Cordle's Admr. v. Corde's Exr., 6 Munf., 455; Timberlake v. Graves, *Ibid.*, 174; Guery v. Vernon, 1 Nott & McC., 69; Biscoe v. Biscoe, 6 Gill & Johns., 232; Raborg v. Hammond, 2 Har. & G., 42; Royal v. Eppes, Admr., 2 Munf., 479; Dashiell v. Dashiell, 2 Har. & Gill, 127; Powell v. Glenn *et al.*, 21 Ala., 458; Patterson v. Ellis' Exr., 11 Wend., 259; Bell v. Hogan, 1 Stew., 536; Scott, Exr. v. Price, Exr., 2 S. & R., 59; Williams v. Graves, Exr., 17 Ala., 62; Mifflin v. Neal, Admr., 6 S. & R., 460;

The strict and ancient doctrine of the indivisibility of a chattel, though still retained by the courts of law, has no place in the modern court of chancery, which, in administering equity, carries out to the utmost the intentions of the parties. In equity, therefore, under a gift of personal property of any kind to A. for his life, and after his decease to B., A. is merely entitled to a life interest, and B. has, during the life of A., a vested interest in the remainder, of which he may dispose at his pleasure; and the court of chancery will compel the person to whom the courts of law may have awarded the legal interest to make good the disposition. Accordingly, if the personal property so given should consist of movable goods, equity will compel A., the owner for life, to furnish and sign an inventory of the goods; and it formerly required him, also, to enter into an undertaking to take proper care of them.<sup>1</sup> This doctrine, however, is comparatively of modern date; for formerly the court of chancery followed the rules of law in the construction of such gifts; and, if a gift of movable goods had been made to A. for his life, and after his decease to B., it would not have afforded to B. any assistance after A.'s decease.<sup>2</sup> But, if the gift had been of the *use or enjoyment* of the goods only to A. for his life, and after his decease to B., the court would then have assisted B. by declaring A.'s representatives after his decease to be trustees only for the benefit of B.<sup>3</sup> But this distinction is now exploded; and the only case in which the tenant for life is now entitled absolutely to things given to him for life is that of articles *quæ ipso usu consumuntur*, as wines, etc., a gift of which to a person for his life vests in him the absolute ownership.<sup>4</sup> In all other cases, as we have said, modern equity will assist the donee in remainder, to whom any gift of personal estate may be made after the decease of another who is to have them only for his life.<sup>5</sup> When, therefore, it is wished to make a settlement of any kind of personal property, the doctrine of the court of chancery is at once resorted to. The property is assigned to trustees, *in trust* for A. for

Usilton v. Usilton *et al.*, 3 Md. Ch. Decs., 36; Woodley v. Findley *et al.*, 9 Ala., 716; Machen v. Machen, 15 *Ibid.*, 373; Rowe v. White, 1 Green, 411.—G. & W.

<sup>1</sup> Fearne, Cont. Rem., 407; Conduitt v. Soane, 1 Coll., 285. But see *ante*, p. 35.

<sup>2</sup> Fearne, Cont. Rem., 402.

<sup>3</sup> *Ibid.*, 404.

<sup>4</sup> Randall v. Russell, 3 Meriv., 190; Andrew v. Andrew, 1 Coll., 690.

<sup>5</sup> Fearne, Cont. Rem., 406.

his life, and after his decease *in trust* for B., etc. This assignment to the trustees vests in them the whole legal interest in the property; and in a court of law they are held to be absolutely entitled to it; for the Statute of Uses<sup>1</sup> has no application to any kind of personal estate. But in equity the trustees are compellable to pay the entire income to A. for his life, and after his decease to B., and so on according to the trusts of the settlement; and, if B. should alien his interest during the life of A., the trustees will be bound, on having notice of the disposition, to stand possessed of the property, after A.'s decease, in trust for the alienee.

When shares in joint stock companies are settled in the manner above mentioned, it sometimes becomes a question whether any extraordinary profit which may be divided amongst the shareholders by way of bonus should be considered as capital or as interest. The equitable tenant for life is too frequently inclined to consider himself entitled to any bonus in the same manner as to ordinary dividends. The court of chancery, however, usually considers every bonus, whether consisting of additional joint stock or shares,<sup>2</sup> or simply of money,<sup>3</sup> as part of the capital, unless it appear to be nothing more than an increased dividend arising from the increased profits of the year.<sup>4</sup> In the absence, therefore, of any special provision to the contrary, every bonus ought to be invested upon the trusts of the settlement, and only the income paid to the tenant for life.

In the United States, some of the cases follow the English rule upon this subject;<sup>5</sup> but others adopt the juster view that all accumulations during the existence of the life-tenancy are rightfully the property of the life tenant.<sup>6</sup>

At common law, there could be no apportionment, in point of

<sup>1</sup> 27 Henry VIII., c. 10; Williams' Real Property, 126, 2d ed.; 131, 3d and 4th eds.; 136, 5th ed.; 142, 6th ed.; 146, 7th ed.; 152, 8th ed.; 6th Am. ed., 130.

<sup>2</sup> Brander v. Brander, 4 Ves., 800; Hooper v. Rossiter, 13 Price, 774; s. c., McClelland, 527.

<sup>3</sup> Paris v. Paris, 10 Ves., 185; Ward v. Combe, 7 Sim., 634. See also Gilly v. Burley, 22 Beav., 619, 624, and the cases there collected.

<sup>4</sup> Barclay v. Wainwright, 14 Ves., 66; Price v. Anderson, 15 Sim., 473; Preston v. Melvill, 16 Sim., 163; Maclaren v. Stainton, 3 De G. F. & J., 203.

<sup>5</sup> Minot v. Paine, 99 Mass., 101; Daland v. Williams, 101 Mass., 571.

<sup>6</sup> Earp's Appeal, 28 Pa. St., 363; Wiltbank's Appeal, 64 Pa. St., 256; s. c., 3 Am. Rep., 585.

time, of rents; i.e., although, if there were several owners of a reversion, the rent was divisible among them in the proportion of their respective interests,<sup>1</sup> no such apportionment could be claimed, either at law or in equity, as between the representatives of a particular tenant and the remainderman; as, for example, in case of the death of a life tenant of the reversion between two rent-paying dates. A very learned author seems to have supposed that, in such a case, the lessee would go free of rent for the period preceding the death of the life tenant.<sup>2</sup> This, however, would constitute, in effect, an apportionment; and the rule, so understood, would amount simply to depriving the life tenant's estate of the portion which accrued in his lifetime. The correct rule gives to the person who is owner when the rent falls due all rent which has accrued since the last rent-paying date.<sup>3</sup> But, if the lease were terminated between rent-paying dates without the fault of the tenant, as where the lessor, by virtue of the right to do so reserved in the lease, terminates the tenancy by sale of the estate between the times for rent-payment, he cannot recover for rent, or for use and occupation, subsequent to maturity of the last instalment.<sup>4</sup>

The same rule of non-apportionment applied to annuities, and to dividends upon stocks, etc., held by a particular tenant with remainder to or reversion in another.<sup>5</sup> If the life-tenant died on the day upon which a dividend fell due, it became a part of his estate.<sup>6</sup> And if the purpose of an annuity was the maintenance of an infant, or of a married woman living separate from her husband, an intent to apportion was presumed, in equity, from the necessity of the case.<sup>7</sup>

These rules still prevail except where, as in some of the United States, and now in England, they have been altered by statute. They doubtless originated in the tendencies of the feudal era to concentrate wealth and power into the hands of a few, as is, perhaps, illustrated by the fact that when, in later times, it became lawful to take interest for the use of money, a different rule was adopted for

<sup>1</sup> 3 Kent Com., 470.

<sup>2</sup> 3 Kent Com., 470.

<sup>3</sup> 1 Wash. on Real Prop., 98, 337.

<sup>4</sup> 1 Wash. on Real Prop., 341.

<sup>5</sup> *Pearly v. Smith*, 3 Atk., 260; *Sherrard v. Sherrard*, 3 Atk., 502; *Warden v. Ashburner*, 2 De G. & S., 366; *Queen v. Lords of the Treasury*, 16 Q. B., 357 (71 E. C. L.).

<sup>6</sup> *Paton v. Sheppard*, 10 Sim., 186.

<sup>7</sup> *Hay v. Palmer*, 2 P. Wms., 501; *Howell v. Hanforth*, 2 W. Black., 1016; 3 Kent Com., 471, note a, and citations.

cases of that nature, it being held that, although such interest may be payable at stated intervals, it nevertheless accrues *de die in diem* so long as the principal remains unpaid.<sup>1</sup> There is, of course, no reason in principle why rents, quite as much as interest, should not be held to accrue *de die in diem*.

An estate tail, such as that created by a gift of lands to a man and the heirs of his body,<sup>2</sup> has nothing analogous to it in personal property. An estate tail cannot be held in such property at law, neither does equity admit of any similar interest. A gift of personal property of any kind to A. and the heirs of his body will simply vest in him the property given.<sup>3</sup> And, in the construction of wills, where many informal expressions are allowed to vest an estate tail in lands, the general rule is, that expressions, which if applied to real estate would confer an estate tail, shall, when applied to personal property, simply give the absolute interest.<sup>4</sup> The same effect will be produced by a gift of such property to a man and his heirs. The words "heirs" and "heirs of his body" are quite inapplicable to personal estate; the heir, as heir, has nothing to do with the personal property of his ancestor. Such property has nothing hereditary in its nature, but simply belongs to its owner for the time being. Hence, a gift of personal property to A. simply, without more, is sufficient to vest in him the absolute interest.<sup>5</sup> Whilst, under the very same words, he would acquire a life interest only in real estate,<sup>6</sup> he will become absolutely entitled to personal property. Thus, a gift of lands to A. for life, and after his decease to B., gives to B. a mere life interest in remainder expectant on the decease of A.<sup>7</sup> But a gift of personal property to A. for life, and after his decease to B., gives to B. a vested equitable interest in the corpus or body of the fund, to which he becomes absolutely entitled, sub-

<sup>1</sup> *Edwards v. Countess of Warwick*, 2 P. Wms.; 171, 176; *Banner v. Lowe*, 13 Ves., 135; *Sherrard v. Sherrard*, 3 Atk., 502.

<sup>2</sup> See *Williams' Real Property*, 28, 2d ed.; 30, 3d and 4th eds.; 33, 5th, 6th, 7th and 8th eds.; 6th Am. ed., 33.

<sup>3</sup> *Fearne, Cont. Rem.*, 461, 463; *Doncaster v. Doncaster*, 3 Kay & J., 26.

<sup>4</sup> 2 *Jarm. Wills*, c. 44; 534, 3d ed.

<sup>5</sup> *Byng v. Lord Stafford*, 5 Beav., 558.

<sup>6</sup> *Williams' Real Property*, 17, 114, 2d. ed.; 18, 119, 3d and 4th eds.; 18, 125, 5th ed.; 18, 131, 6th ed.; 18, 134, 7th ed.; 19, 140, 8th ed.; 6th Am. ed., 21, 117.

<sup>7</sup> *Goodtitle d. Richards v. Edmonds*, 7 Term. Rep., 635. But see *White v. Crenshaw*, 5 Mackey's R., 113.

ject only to A.'s life interest; and the circumstance of B.'s dying in the lifetime of A. would be immaterial.<sup>1</sup>

It is true that, in deeds and other legal instruments, it is usual to transfer personal estate absolutely by the use of the words "executors, administrators and assigns." As real estate is conveyed to a man, his heirs and assigns,<sup>2</sup> so personal property is assigned to him, his executors, administrators and assigns. The executor or administrator is, as we shall see, the person who becomes legally entitled to a man's personal estate after his decease; in the same manner that a man's heir or assign becomes entitled to his real property. But the analogy extends no further. There is no necessity for the use of these terms<sup>3</sup> as there is for the employment of the word "heirs." These terms, however, are constantly employed in conveyancing as words of limitation of an absolute interest; and a rule has sprung up with respect to their construction similar to the rule in Shelley's case, by which the word "heirs," when following a life estate given to the ancestor, is merely a word of limitation, giving to such ancestor as estate in fee.<sup>4</sup> Thus, if money or stock be settled in trust for A. for life, and after his decease in trust for his executors, administrators and assigns, A. will be simply entitled absolutely;<sup>5</sup> in the same manner as a gift of lands to A. for his life, with remainder to his heirs and assigns, gives him an estate in fee simple. But as the rule, so far as it applies to personal property, is not founded on the same strict principle as the rule in Shelley's case, a gift of such property to the executors or administrators (not adding assigns) of a person who has taken a previous life interest is sometimes construed as giving him no further interest in such property;<sup>6</sup> whilst, under the same circumstances, the word

<sup>1</sup> *Benyon v. Maddison*, 2 Bro. C. C., 75.

<sup>2</sup> *Williams' Real Property*, 115, 2d ed.; 120, 3d and 4th eds.; 126, 5th ed.; 132, 6th ed.; 135, 7th ed.; 141, 8th ed.; 6th Am.; 6th Am. ed., 118.

<sup>3</sup> *Elliott v. Davenport*, 1 P. Wms., 84. See *Earl of Lonsdale v. Countess of Barchtoldt*, 1 Kay, 646.

<sup>4</sup> See *Williams' Real Property*, 207, 2d ed.; 214, 3d ed.; 215, 4th ed.; 224, 5th ed.; 234, 6th ed.; 240, 7th ed.; 250 8th ed.; 6th Am. ed., 218, 222.

<sup>5</sup> *Co. Litt.*, 54 b; *Hames v. Hames*, 2 Keen, 646; *Graftley v. Humpage*, 1 Beav., 46; *Howell v. Gayler*, 5 Beav., 157; *Meryon v. Collett*, 8 Beav., 386; *Morris v. Howes*, 4 Hare, 599.

<sup>6</sup> *Wallis v. Taylor*, 8 Sim., 141. See *Grafty v. Humpage*, 1 Beav., 52; *Daniel v. Dudley*, 1 Phi., 1; *Attorney-General v. Malkin*, 2 Phi., 64; *Mackenzie v. Mackenzie*, 3 Macn. & G., 559. See also *Alger v. Parrott*, V.-C. W., Law Rep., 3 Eq., 328.

"heirs," in a gift of real estate, would have given him the fee simple.

As no estates can subsist in personal property, it follows that the rules on which contingent remainders in freehold lands depend for their existence have never had any application to contingent dispositions of personal property. Such dispositions partake rather of the indestructible nature of executory devises and shifting uses. Thus a gift of lands to A. for his life, and after his decease to such son of A. as shall first attain the age of twenty-one years, creates a contingent remainder, which will fail in the event of no son of A. having attained the prescribed age at the time of his decease.<sup>1</sup> The reason of this failure depends on the ancient rule that there must always be some defined owner of the feudal possession; and, consequently, between the time of the death of A. and the time of his son's attaining the age of twenty-one years, some owner of the freehold ought to have been appointed, in whom the feudal possession might continue.<sup>2</sup> Personal property, however, has evidently nothing to do with these feudal rules relating to possession. If, therefore, a gift be made of personal property to trustees, in trust for A. for his life, and after his decease, in trust for such son of A. as shall first attain the age of twenty-one years; or if a term of years be bequeathed to A. for his life, and after his decease to such son of A. as shall first attain the age of twenty-one years, it will be immaterial whether or not the son attain the age of twenty-one years in the lifetime of his father. On his attaining that age, he will become entitled quite independently of his father's interest. His ownership will spring up, as it were, on the given event of his attaining the age. But, as the indestructible nature of these future dispositions of personal estate might lead to trusts of indefinite duration, the rule of perpetuities, which confines executory interests within a life or lives in being, and twenty-one years afterwards, with a further allowance for the time of gestation, should it exist,<sup>3</sup> applies equally to personal as to real estate.

<sup>1</sup> *Festing v. Allen*, 12 M. & W., 279; s. c., 5 Hare 573; *Holmes v. Prescott*, V.-C. W. 10 Jur. N. S., 507; 12 W. R., 636.

<sup>2</sup> *Williams' Real Property* 209, 1st ed.; 217, 2d ed.; 224, 3d & 4th eds.; 233, 5th ed.; 246, 6th ed.; 250, 7th ed.; 259, 8th ed.; 6th Am. ed., 231-232.

<sup>3</sup> *Williams' Real Property*, 242, 1st ed.; 251, 2d ed.; 259, 3d ed.; 262, 4th ed.; 272, 5th ed.; 286, 6th ed.; 294, 7th ed.; 305, 8th ed.; 6th Am. ed., 271.



In some of the United States, but not in all, restrictions upon the period during which the income of either personal or real estate may be accumulated, analogous to those imposed in England by the Statute of 39 & 40 Geo. III., c. 98, commonly known as the Thellusson Act, have been enacted.

Equitable interests in personal property of a future kind may be created through the instrumentality of powers, in a similar manner and to the same extent as future estates in land.<sup>1</sup> Thus, stock in the funds may be vested in the trustees upon such trusts as B. shall by any deed or by his will appoint and, in default of and until any such appointment, in trust for C., or upon any other trusts. Here C. will have a vested interest in the stock, subject to be divested or destroyed by B.'s exercising his power of appointment; and B., though not owner of the stock, has power to dispose of it by deed or will, and may, if he please, appoint to himself; in which case the trustees will be bound to transfer it to him. If the power should not be exercised by B., C. will then be entitled absolutely; and the stock will not, as was formerly the case with respect to lauded property, be subject to judgment debts incurred by B.,<sup>2</sup> or to any other of his debts. But if B. should exercise his power by deed without valuable consideration, or by will, in favor of a third person, the stock so appointed would be considered in equity as part of the assets of B. the appointor, and would be subject to the demands of his creditors in preference to the claim of the appointee.<sup>3</sup>

The rules respecting the necessity of a compliance with the terms and formalities of the power, whenever it is exercised otherwise than by will,<sup>4</sup> and the relief afforded by the court of chancery on the defective exercise of a power,<sup>5</sup> apply as well to personal as to real property.

A frequent instance of the employment of a power over person-

<sup>1</sup> See Williams' Real Property, 231, *et seq.*, 1st ed.; 236, 2d ed.; 243, 3d ed.; 245, 4th ed.; 255, 5th ed.; 266, 6th ed.; 272, 7th ed.; 283, 8th ed.; 6th Am. ed., 225 *et seq.*

<sup>2</sup> *Ibid.*

<sup>3</sup> *Lassells v. Cornwallis*, 2 Vern., 465; *Bainton v. Ward*, 2 Atk., 172. The doctrine applies also to appointments of real estate. See *Fleming v. Buchanan*, 3 De G., M. & G., 976.

<sup>4</sup> See Williams' Real Property, 238, 2d ed.; 245, 3d ed.; 247, 4th ed.; 557, 5th ed.; 268, 6th ed.; 274, 7th ed.; 285, 8th ed.; 6th Am. ed., 255-256.

<sup>5</sup> *Ibid.*, 239, 2d ed.; 246, 3d ed.; 248, 4th ed.; 258, 5th ed.; 269, 6th ed.; 276, 7th ed.; 287, 8th ed.; 6th Am. ed., 257-258.

alty occurs in the case of children's portions, which are usually settled on all the children equally, subject to a power given to the parents to appoint the shares in a different manner. When such a power is exercised, the shares previously vested in the children are divested from them, and new shares are vested in them by the operation of the power. If such a power were so worded as not to authorize an exclusive appointment to some or one of the children, it was held by the court of chancery, as a rule of equity, that each child ought to have a substantial share; and an appointment to any child of a very small share was called an *illusory appointment*, and was held void.<sup>1</sup>

Although, under recent statutes, no appointment is now void, in England, for being illusory, yet, where an exclusive appointment is not authorized, any appointment, by which any object of the power would be entirely excluded, is still void. Thus, if 1000*l.* be given to A., B. and C. in such shares as their father shall appoint, and, in default of appointment, to them equally, an appointment of 900*l.* to A. would be good, as 100*l.* would remain to be equally divided between the three,<sup>2</sup> of which B. and C. would get each one-third.<sup>3</sup> But a subsequent appointment of the remaining 100*l.* to B. would be void, as altogether excluding C., who is equally an object of the power.<sup>4</sup> It is customary, however, in modern settlements to give to parents a power of appointment in favor of any one or more of the children exclusively of the others. And in order that those to whom the appointments have been made should not obtain more than may have been intended for them, it is generally provided that no child taking any share of the fund under any appointment shall be entitled to any share in the part unappointed without bringing his or her share into *hotchpot*,<sup>5</sup> and accounting for the same accordingly. Under such a provision, A., in the instance above given, would not be entitled to any share in the 100*l.* unappointed, without also agreeing to a like division of his 900*l.* amongst himself and the others. The clause of *hotchpot*

<sup>1</sup> 1 Sugd. Pow., 568, *et seq.*; 449, 8th ed.; Chance on Powers, 396 *et seq.*

<sup>2</sup> Young v. Waterpark, 13 Sim., 202.

<sup>3</sup> Wilson v. Piggott, 2 Ves., Jr., 351; Wombwell v. Hanrott, 14 Beav., 143. See Foster v. Cautley, 6 De G., M. & G., 55.

<sup>4</sup> 2 Ves., Jr., 355.

<sup>5</sup> Termed in the civil law, "*collation*;" Reed v. Crocker, 12 La. Ann., 436.—G. & W.

operates favorably to the representatives of those children who may happen to die before any appointment shall have been made to them. For, when a power is given to appoint amongst children, no appointment can be made to the executors or administrators of those who may have died ;<sup>1</sup> so that such executors or administrators cannot possibly take more than the aliquot part given to the deceased child in default of any appointment ; whilst they may be partially or totally excluded even from that by a partial or complete exercise of the power of appointment in favor of the surviving children, or even of a single survivor. When the appointment is partial only, the executors or administrators of a deceased child will, under the hotchpot clause, divide the fund unappointed with the other children to whom no appointment may have been made ; whereas, without such a clause, the children to whom appointments may have been made would be equally entitled to participate in the part unappointed.<sup>2</sup>

When a power is given to appoint property amongst a particular class, no portion of the fund can be appointed in favor of any person who is not a member of that class ; and any appointment to such person will accordingly be void. Thus, if the power be to appoint the property to all or any of the *children* of the appointor in such manner as he may think fit, no interest in the property can be appointed to any *grandchild* of the appointor ; for a grandchild is not an object of the power.<sup>3</sup> So, if the power be to appoint amongst nephews or grandnephews, those only can take any shares who answer that description.<sup>4</sup> Again, if the power be to appoint portions amongst younger children, nothing can be taken by a younger son who afterward becomes the eldest by the decease of his elder brother ;<sup>5</sup> although, if he should have actually received any share in the money whilst a younger son, he will not be obliged

<sup>1</sup> Boyle v. The Bishop of Peterborough, 1 Ves., Jr., 299 ; Ricketts v. Loftus, 4 You. & Col., 519.

<sup>2</sup> Wilson v. Piggott, 2 Ves., Jr., 351 ; Wombwell v. Hanrott, 14 Beav., 143 ; Walsley v. Vaughan, 1 De G. & J., 114.

<sup>3</sup> Alexander v. Alexander, 2 Ves., Sr., 640 ; Bristow v. Warde, 2 Ves., Jr., 336.

<sup>4</sup> Falkner v. Butler, Amb. 514 ; Waring v. Lee, 8 Beav., 247.

<sup>5</sup> Chadwick v. Doleman, Vern., 528 ; Lord Teynham v. Webb, 2 Ves., Sr., 198 ; Gray v. Earl of Limerick, 2 De G. & Sm., 370. See Sandeman v. Mackenzie, 1 John. & H., 613.

to refund it on becoming the eldest.<sup>1</sup> The word "younger," however, is not, in parental provisions,<sup>2</sup> taken literally, but as meaning any child who may not be entitled to the family estate. Therefore a daughter, who may be the eldest child, would be considered as a proper object of a power to appoint amongst the younger children, whilst her younger brother, being the eldest son entitled to the family estate, would not be allowed to participate.<sup>3</sup> And, in the same manner, a second son, becoming the eldest, but not obtaining the family estate, would be allowed a share.<sup>4</sup> A power to appoint amongst children living at their father's decease includes a child *en ventre sa mère*.<sup>5</sup>

In some cases, where the power only authorizes an appointment amongst children, an appointment in favor of the issue of a child may be sustained as being, in effect, first an appointment to the child, and then an assignment by such child in favor of his issue.<sup>6</sup> But this, of course, can only be done when the child is of age, and is a party to and executes the deed by which the appointment is made. And the more regular plan in such cases is for the father first to make the appointment in favor of the child, and then for the child to make an assignment of the fund appointed to trustees in trust for his children in the manner intended.

An appointment by a father in favor of his child, in exercise of a power for that purpose, ought to be made for the benefit of the child who is the object of the provision, and not indirectly for the benefit of the father who makes the appointment or of any other person.<sup>7</sup> Accordingly, any exercise of the power under a bargain

<sup>1</sup> 2 Sugd. Pow., 293; 680, 8th ed.

<sup>2</sup> Hall v. Hewer, Amb., 203; Lyddon v. Ellison, 19 Beav., 565.

<sup>3</sup> Pierson v. Garnet, 2 Bro. C. C., 38; Heneage v. Hunloke, 2 Atk., 456; Beale v. Beale, 1 P. Wms., 244.

<sup>4</sup> Spencer v. Spencer, 8 Sim., 87; Macoubrey v. Jones, 2 Kay & J., 684; Sing v. Lealie, 2 Hem. & Mil., 68.

<sup>5</sup> Beale v. Beale, 1 P. Wms., 244.

<sup>6</sup> Routledge v. Dorril, 2 Ves., Jr., 357; West v. Berney, 1 Russ. & My., 431, 439; Goldsmid v. Goldsmid, 2 Hare, 187; Limbard v. Grote, 1 Myl. & K., 1.

<sup>7</sup> Bostick v. Winton, 1 Sneed, 524, may be referred to in illustration of the doctrine stated in the text; in which case it was decided that a conveyance made to a child, in order that he might have sufficient property to become bail for the father, the appointor, and to become security for the father's debts, with the understanding that the land was to be reconveyed, was not such an appointment in good faith as would defeat the remainders.—G. & W.

for, or even with a view to the benefit of, the appointor, or of any other person than one of the objects of the power, will be considered, in technical phrase, as a fraud on the power and will be void.<sup>1</sup> But when there is no evidence that the appointment is made under a bargain for the benefit of the father, although there may be strong suspicion that such is the case, the appointment cannot be set aside.<sup>2</sup> Powers of appointment amongst children usually enable the parent to fix the age or time at which the fund appointed shall vest in any child. But, on the principle just stated, a father will not be allowed to make an immediate appointment to an infant child, for the sake of becoming himself entitled to the fund appointed, as the child's personal representative in the event of its decease.<sup>3</sup> An appointment to an infant is not, however, necessarily void on account of the circumstance that the father, who has made the appointment, will become entitled to the property appointed in the event of the child's decease.<sup>4</sup>

In the exercise of powers of appointment amongst children, care should be taken not to postpone the vesting of their shares to a period which may exceed the limits allowed by the law of perpetuity.<sup>5</sup> When the power of appointment is a general power, enabling the appointor to make a disposition in favor of any object he may please, the property is evidently not tied up so long as such a power exists over it; and neither the reason nor the rule which forbids a perpetuity has any application till some settlement is made in exercise of such a power. In such a case, therefore, the limits of perpetuity commence from the time of the appointment.<sup>6</sup> But, where the power of appointment is to be exercised only in favor of a particular class of objects, the property subject to the power is evidently already tied up in favor of that class. The limits of perpetuity are therefore in this case to be reckoned, not from

<sup>1</sup> *Daubeney v. Cockburn*, 1 Meriv., 626; *Palmer v. Wheeler*, 2 Ball. & B., 18; *Jackson v. Jackson*, 1 Dru., 91; *Thompson v. Simpson*, 2 Jones & Lat., 110; *Topham v. Duke of Portland*, 1 De G., J. & S., 517; *Pryor v. Pryor*, 2 De G., J. & S., 205.

<sup>2</sup> *M'Queen v. Farquhar*, 11 Ves., 467; *Hamilton v. Kirwan*, 2 Jones & Lat., 393; *Campbell v. Home*, 1 You. & Col., N. C., 664.

<sup>3</sup> *Cunynghame v. Thurlow*, 1 Russ. & My., 436; *Lord Sandwich's Case*, cited 11 Ves., 479; *Gee v. Gurney*, 2 Coll., 486.

<sup>4</sup> *Butcher v. Jackson*, 14 Sim., 444; *Fearon v. Desbrisay*, 14 Beav., 635.

<sup>5</sup> See *ante*, p. 278.

<sup>6</sup> 1 Sugd. Pow., 249, 495; 395, 8th ed.

the time of the exercise of the power, but from the date of its creation. The interests given by the power must, for this purpose, be regarded as if they had been inserted in the settlement by which the power was created; and if such interests would have been too remote if inserted in the original settlement, they will be too remote when given in exercise of the power.<sup>1</sup> Thus, a person having a general power of appointment by will over a fund, may by his will appoint a share of it in favor of any unborn child of his own, to be vested in such child on his attaining the age of twenty-three years. The limit of perpetuities is reckoned from the time of the appointment, which in this case is the death of the appointor, when his will begins to take effect. The child must necessarily then be born, or in *ventre sa mère*, and the child's life is accordingly the life then in being within which the share must necessarily vest. But if, by a marriage settlement, a fund be settled in trust for the father for his life, and after his decease in trust for the children in such shares as he shall appoint by his will, he cannot make an appointment in favor of any unborn child, to be vested on his attaining the age of twenty-three years. For in this case the limit of perpetuities counts from the date of the settlement, when the property was first tied up for the benefit of the children; and this limit would be exceeded if the child should not attain the given age within twenty-one years after the decease of the father, who was the life in being at the date of the settlement. And the rule is that every limitation which *may* exceed in duration a life or lives in being, and twenty-one years afterwards (allowing for the period of actual gestation), is void as tending to a perpetuity.<sup>2</sup>

When personal property is directed to be paid to any persons at a future time the leaning of the courts is always in favor of vested interests; that is to say, the courts lean to that construction which will give to the parties a present assignable and transmissible right to that which is not payable till a future time. Thus, if a legacy be given to a person to be payable when he attains the age of twenty-one years, the legacy is considered to be immediately vested, and it will accordingly be payable to the administrator of the legatee in

<sup>1</sup> Co. Litt., 271 b. n. (1), vii. 2; 1 Sugd. Pow., 498; 399, 8th ed.; Routledge v. Dorril, 2 Ves. Jr., 357.

<sup>2</sup> See Williams' Real Property, 242, 1st ed.; 251, 2d ed.; 259, 3d ed.; 273, 5th ed.; 287, 6th ed.; 294, 7th ed.; 305, 8th ed.; 6th Am. ed., 271 *et seq.*

case he should die under age.<sup>1</sup> So, if personal estate be settled in trust for A. for life, and after his decease for all his children in equal shares, each of his children will be entitled to a share, whether such child survive his parent or not, and although such child should die in infancy.<sup>2</sup> If, however, the property should consist of money charged on land or other real estate, such as the portions of younger children when the family estate is entailed on the eldest son, the rule is different; and, if any of the children should die before the time when his or her portion becomes payable, it will, in the absence of special provision to the contrary, sink into the land for the benefit of the estate.<sup>3</sup>

In the settlement of personal property upon children, there are two plans, either of which may be adopted with respect to the vesting of the interests given. The one plan is to vest the interests of the children in them immediately as they come into being, divesting from each of them proportionate shares as others are born, and also divesting the shares altogether in favor of the others, in the event of the decease of any son under age, or of any daughter under age, and without having been married. The other plan is to vest the interests given only in those who, being sons, attain the age of twenty-one years, or, being daughters, attain that age or marry under it. So far as the corpus of the fund is concerned, the result of each of these plans is the same, the property being ultimately divided only amongst those children who, being sons, live to come of age, or, being daughters, come of age or previously marry. But with regard to the income of the fund the plans are different. In the first case, the income belongs to the children whilst under age; but, in the second, no interest either in the income or in the principal is given during minority, or, in the case of the daughters, until marriage under age. In the first case, therefore, if the father be dead, the income will be payable to the guardian of the children toward their maintenance and education; but, in the second case, there will be no provision for these purposes in the absence of express directions. Such directions, therefore, should, in such case,

<sup>1</sup> 2 Black. Comm., 513; Co. Litt., 237. a, note (1); see *Croxall v. Shererd*, 5 Wall., 287-8; *Doe, Lessee of Poor, v. Considine*, 6 Wall., 458.

<sup>2</sup> *Skey v. Barnes*, 3 Mer., 335; *Temple v. Warrington*, 13 Sim., 267. See *Swallow v. Binns*, 1 Kay & John., 417.

<sup>3</sup> Co. Litt., 237, a. n. (1). See *Evans v. S. . .*, 1 H. of L. C., 43, 57.

be always inserted, with a provision for the accumulation of the surplus income by way of increase of the principal. If, however, the whole property is ultimately to go amongst the children,<sup>1</sup> or, if the persons entitled, in the event of the children not living to attain vested interests, should agree,<sup>2</sup> the court of chancery will direct the income to be applied for the children's maintenance in the absence of sufficient provision for that purpose, and even in the face of an express direction to accumulate the income.<sup>3</sup>

In marriage settlements, a life interest is usually and properly given to the father and mother, so that no provision is required for the maintenance of the children until after the decease of the survivor. And, where life interests are not given to the parents, but provision is made for the maintenance of the children during the father's lifetime out of the settled fund, such provision is considered as primarily applicable for the maintenance of the children accordingly.<sup>4</sup> But the general rule is that every father is bound to maintain his children, if of ability so to do;<sup>5</sup> and a provision contained in a gift to an infant child, for his maintenance and education, will not be applied for that purpose during his father's lifetime, if the father is able to maintain him in a manner suitable to his condition and prospects.<sup>6</sup> When, therefore, it is intended that the income of property given to children should be applied to their maintenance during their father's lifetime, without reference to his ability to maintain them, the application of the income, without reference to his ability, should be expressly directed; and, if such application be so directed, the income must, of course, be applied accordingly.<sup>7</sup> When two funds are provided for the maintenance of an infant, it is frequently difficult to decide to which fund recourse should be first had. The general rule is that the interest of the infant determines the order of application;<sup>8</sup> but, in order

<sup>1</sup> *Haley v. Bannister*, 4 Mad., 275; *Errat v. Barlow*, 14 Ves., 202.

<sup>2</sup> *Turner v. Turner*, 4 Sim., 430; *Cannings v. Flower*, 7 Sim., 523.

<sup>3</sup> *Greenwell v. Greenwell*, 5 Ves., 194.

<sup>4</sup> *Stocken v. Stocken*, 4 Sim., 152; *Meacher v. Younge*, 2 Myl. & K., 490; *Ransome v. Burgess*, V.-C. K., Law Rep., 3 Eq., 773. See *Thompson v. Griffin*, 1 Craig & Phillips, 317.

<sup>5</sup> *Andrews v. Partington*, 3 Bro. C. C., 60.

<sup>6</sup> *Maberley v. Turton*, 14 Ves., 499; *Jervoise v. Silk*, G. Cooper, 52; *Ex parte Williams*, 2 Collyer, 740.

<sup>7</sup> See *Wetherell v. Wilson*, 1 Keen, 80; *White v. Grane*, 18 Beav., 571.

<sup>8</sup> *Foljambe v. Willoughby*, 2 Sim. & Stu., 165; *Lygon v. Lord Coventry*, 14 Sim., 41.



to avoid questions, it is very desirable, when two funds are provided for an infant's maintenance, to direct that one of them shall be in aid only of the provision afforded by the other.

The consent of the persons for the time being entitled to the income of the property is generally required, in settlements, to any change of investment which the trustees may be authorized to make; and this consent is sometimes required to be in writing, and occasionally to be testified by deed. Where consent is required, it must be given previously to or at the time of the change of investment;<sup>1</sup> for, as the consent is required as a check upon the trustees, a subsequent consent, when the mischief may be done, is evidently unavailing. The person whose consent is required is not, however, the sole judge of the propriety of any change of investment: the trustee, by virtue of his office, has also a discretion; and, if he should consider the investment ineligible, he may refuse to make it, although requested so to do by the person whose consent ought to be obtained.<sup>2</sup> But the terms of the instrument may require the trustees to change the investments at the request of any given person; and in this case they will generally be bound to act accordingly, unless the circumstances of the case should be such as were evidently not contemplated when the settlement was made.<sup>3</sup>

In settlements of personal property, authority is sometimes given to the trustees to make investments in the purchase of landed estates. As land devolves in a different manner from personal property, it is obvious that a simple change of property from personalty to land would, in many cases, materially disarrange the destination of the property. Thus, if a person entitled under the settlement to a reversionary interest in the settled fund should have died intestate, his administrator would be entitled to such interest, so long as the property continued personal, but, on its being changed into real estate, it would shift to his heir-at-law. In order to obviate this inconvenience, it is so contrived that the lands to be purchased should, from the moment the purchase is made, be considered as personal property. To effect this object, the lands, when

<sup>1</sup> *Bateman v. Davis*, 3 Madd., 98; *Greenham v. Gibson*, 10 Bing., 363 (25 E. C. L.); *Wiles v. Gresham*, 2 Drewry, 258.

<sup>2</sup> *Lee v. Young*, 2 You. & Col., N. C., 532.

<sup>3</sup> *Boss v. Goddall*, 1 You. & Col., N. C., 617; *Cadogan v. Earl of Essex*, 2 Drewry, 227.

purchased, are directed to be held by the trustees upon trust to sell them, with the consent of the equitable tenant for life, during their lives, and after their decease at the discretion of the trustees. This trust for sale converts the land into money in the contemplation of equity; for it is a rule of equity that whatever is agreed to be done shall be considered as done already. In the words of Sir Thomas Sewell,<sup>1</sup> "Nothing is better established than this principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted; and this in whatever manner the direction is given, whether by will, by way of contract, marriage articles, settlement, or otherwise, and whether the money is actually deposited or only covenanted to be paid, whether the land is actually conveyed or only agreed to be conveyed. The owner of the fund or the contracting parties may make land money, or money land." And, if land is clearly directed to be sold, the circumstance that the consent of some person or persons is required to the sale will not prevent the immediate conversion of the land into money in the contemplation of equity, although such a circumstance may often cause a long postponement of the period of its actual conversion.<sup>2</sup> Notwithstanding a trust for the sale of land, if all the parties interested should be of full age,<sup>3</sup> and if females unmarried,<sup>4</sup> they may elect that the land shall not be sold; and after such election the land will be considered as real estate in equity as well as at law.<sup>5</sup> And the election of the parties need not be expressed in so many words, but may be inferred from any acts by which their intention is clearly shown.<sup>6</sup>

All carefully drawn settlements of personal estate usually contain a power for the trustees or trustee for the time being, acting in the execution of the trusts, to give receipts for any money payable to

<sup>1</sup> In *Fletcher v. Ashburner*, 1 Bro. C. C., 499, approved by Lord Alvanley, in *Wheldale v. Partridge*, 5 Ves., 396, 397. See also *Griffith v. Ricketts*, 7 Hare, 299; *Craig v. Leslie*, 3 Wheat., 577; *Peter v. Beverly*, 10 Pet., 534.

<sup>2</sup> See *Lechmere v. Earl of Carlisle*, 3 P. Wms., 218, 219.

<sup>3</sup> *Van v. Barnett*, 19 Ves., 102.

<sup>4</sup> *Uldham v. Hughes*, 2 Atk., 452.

<sup>5</sup> *Davies v. Ashford*, 15 Sim., 42.

<sup>6</sup> *Liugen v. Sowray*, 1 P. Wms., 172; *Cookson v. Reay*, 5 Beav., 22; 12 Cl. & Fin., 121.

them or him under the trusts, which receipts, it is usually declared shall effectually discharge the persons paying the money from all responsibility as to its application. The necessity of this provision arises from a rule of equity, by which any person who pays money to another, whom he knows to be merely a trustee, is bound to see the money applied according to the trusts.<sup>1</sup> If, however, the trusts are of such a kind as to require time and discretion to carry them into effect, the receipt of the trustees will, from the nature of the case, be an effectual discharge, without an express clause for this purpose.<sup>2</sup>

Every settlement, the trusts of which are likely to be of long duration, ordinarily contains a power of appointing new trustees in the event of any trustee dying, going to reside beyond the seas, desiring to be discharged, or refusing or becoming incapable to act in the execution of the trusts. And, as the mere appointment of a trustee is not sufficient to vest the trust property in him, it is usual and proper to direct that, on every such appointment, the trust property shall be so conveyed, assigned, transferred or paid as effectually to vest the same in the new trustee jointly with the surviving or continuing trustees, or solely, as the case may require. Every new trustee is also usually invested with the same powers as the original trustees. A mere power to appoint a new trustee does not render such appointment imperative; and, in case of the death of any trustee, the survivors or survivor may still carry on the ordinary business of the trust.<sup>3</sup> When a trustee has once accepted the office, he has no right to retire, unless the person having the power to appoint another trustee in the event of his retiring should consent to do so;<sup>4</sup> or unless, from unforeseen circumstances, the duties of the trust should have become more onerous than was contemplated by the trustee when he accepted the office.<sup>5</sup> But a trustee has always the right to go into court, surrender his trust, and be thereupon relieved from liability for losses subsequently occurring.<sup>6</sup>

The office of trustee of a settlement is one involving great respon-

<sup>1</sup> *Spalding v. Shalmer*, 1 Vern., 301; *Lloyd v. Baldwin*, 1 Ves., Sr., 173.

<sup>2</sup> *Doran v. Wiltshire*, 3 Swanst., 699; *Balfour v. Welland*, 16 Ves., 151.

<sup>3</sup> *Warburton v. Sandys*, 14 Sim., 622.

<sup>4</sup> *Adams v. Paynter*, 1 Coll., 532.

<sup>5</sup> *Coventry v. Coventry*, 1 Keen, 758.

<sup>6</sup> U. S., use of *Lang v. May*, 4 Mackey, 4.

sibility and frequently much trouble, without any remuneration; for a trustee is not allowed to make a profit of his trust.<sup>1</sup> And, if he be a solicitor, he cannot receive payment for his professional trouble incurred in the business of the trust,<sup>2</sup> unless he expressly stipulate, before accepting the office, that he shall be permitted to do so,<sup>3</sup> or unless his charges be voluntarily paid by the *testui que* trust with full knowledge that they might have been resisted.<sup>4</sup> But a trustee may charge against the trust property all costs and expenses properly incurred in the conduct of the trust. And, it has been held that, in the event of a suit being brought against the trustees, one of the trustees, being a solicitor, may be employed by his co-trustees, and that he may make the usual charges against them, provided the amount of the costs be not thereby increased.<sup>5</sup> And every trustee is allowed in a suit his full costs, as between solicitor and client.<sup>6</sup> But his right to costs may be forfeited by his negligence and misconduct;<sup>7</sup> or he may even be made to pay the costs of the other parties.<sup>8</sup> As the trustee has the legal title to the property, he is often enabled, if fraudulently inclined, to sell it or spend it for his own benefit. It is therefore highly proper that his conduct should be narrowly scrutinized, and that he should be invariably punished for any breach of faith. But the court of chancery goes further than this, and punishes, with almost equal severity, his neglect of duties, which in many cases he scarcely knows that he has undertaken. Thus, if a trustee, by his negligence or misplaced confidence in his co-trustee, gives him an opportunity to commit a breach of trust, of which opportunity the co-

<sup>1</sup> *Contra*, in the United States. See *Robinson v. Pett*, 2 Lead. Cas. in Equity, 200.

<sup>2</sup> *Moore v. Frowd*, 3 Myl. & Cr., 45; *Fraser v. Palmer*, 4 You. & Col., 515; *Col-lins v. Carey*, 2 Beav., 128; *Bainbridge v. Blair*, 8 Beav., 588; *Todd v. Wilson*, 9 Beav., 486. See *Ex parte Newton*, 3 De G. & Sm., 584.

<sup>3</sup> *Re Sherwood*, 3 Beav., 388.

<sup>4</sup> *Stanes v. Parker*, 9 Beav., 385. See *Gomley v. Wood*, 3 Jones & Lat., 678.

<sup>5</sup> *Cradock v. Piper*, 1 Macn. & G., 664; *Clack v. Carlon*, V.-C. W., 7 Jur. N. S., 441. See, however, *Lincoln v. Windsor*, 9 Hare, 158; *Lyon v. Baker*, 5 De G. & Sm., 622; *Broughton v. Broughton*, L. C., 1 Jur. N. S., 965; s. c., 5 De G., M. & G., 160.

<sup>6</sup> 2 Fonb. Eq., 176.

<sup>7</sup> *Campbell v. Campbell*, 2 Myl. & Cr., 25; *Howard v. Rhodes*, 1 Keen, 581.

<sup>8</sup> *Wilson v. Wilson*, 2 Keen, 249; *Willis v. Hiscock*, 4 Myl. & Cr., 197; *Firmin v. Pulham*, 2 De G. & Sm., 99.

trustee avails himself, the innocent trustee will be made to replace the whole of the fund abstracted by the other.<sup>1</sup> So, if the trustee should depart from the letter of his trust, as by investing the trust fund on an unauthorized security, although at the importunity of some of the parties interested, and with a *bona fide* desire to benefit them all, he will be answerable for any loss which such departure may have occasioned.<sup>2</sup> And if, being ignorant of law, he should give himself up entirely to his professional adviser, he may still suffer from the mistake of his solicitor or conveyancer;<sup>3</sup> and in such a case he will scarcely perhaps see the justice of the remark that he might (had he known how) have chosen a wiser solicitor, or a more learned counsel.<sup>4</sup> In all ordinary settlements, clauses used to be inserted for the indemnity and reimbursement of trustees, to the effect that they should not be answerable the one for the other of them, or for signing receipts for the sake of conformity, or for involuntary loss; and that they might reimburse them-

<sup>1</sup> Lord Shipbrook v Lord Hitchinbrook, 11 Ves., 252; Brice v. Stokes, 11 Ves., 319; Hanbury v. Kirkland, 3 Sim., 265; Booth v. Booth, 1 Beav., 125; Broadhurst v. Balguy, 1 You. & Col., N. C., 16; Styles v. Guy, 1 Macn. & G., 422; Dix v. Burford, 19 Beav., 409.

<sup>2</sup> Driver v. Scott, 4 Russ., 195; Pride v. Fooks, 2 Beav., 430; Forrest v. Elwes, 4 Ves., 497; Watts v. Girdlestone, 6 Beav., 188.

<sup>3</sup> Willis v. Hiscox, 4 Myl. & Cr., 197; Angier v. Stannard, 3 Myl. & K., 566; Hampshire v. Bradley, 2 Coll., 34; Boulton v. Beard, 3 De G., M. & G., 608; see, however, Poole v. Pass, 1 Beav., 600; Holford v. Phipps, 3 Beav., 434, 4 Beav., 475.

<sup>4</sup> Angier v. Stannard, 3 Myl. & K., 572.

Where trustees act *bona fide* and with due diligence, they have always received the favor and protection of courts of equity, and their acts are regarded with the most indulgent consideration; but, where they have betrayed their trust, grossly violated their duty, or been guilty of unreasonable negligence, their acts are inspected with the severest scrutiny, and they are dealt with according to the rules of strict justice: Diffenderfer v. Winder, 3 Gill & Johns., 312; Gilbert v. Sutliff, 3 Ohio, 129; Ellig v. Naglee, 9 Cal., 683; Smith v. Vertrees, 2 Bush (Ky.), 63. A trustee may, in the discharge of his duty, consult the opinion of counsel, and, if it has been reasonably and properly done, he will be entitled to an allowance for the expense incurred out of the trust estate: Jones v. Stockett, 2 Bland. Ch., 409; Green v. Mumford, 4 R. I., 313; but the advice so given will not protect the trustee from the consequences of a failure to discharge his duty properly; for if he has doubts, or there was room for them, he should apply to a court of equity, which will always give him directions upon which he may rely with entire confidence: Freeman *et al.* v. Cook *et al.*, 6 Ired. Eq., 373; Weber v. Samuel, 7 Barr., 510; Hayden's Exr's. v. Marmaduke, 19 Mo., 403; Ihmsen's Ap., 43 Pa. St., 431. But see Neff's Ap., 57 *Ibid.*, 91.—G. & W.

selves out of the trust funds all costs and expenses incurred in relation to the trust. But these clauses, though often very highly valued by trustees, really afforded them little, if any, further protection than they would have been entitled to if left to the ordinary rules of equity.<sup>1</sup>

Marriage, as we have seen,<sup>2</sup> is a valuable consideration. Every settlement, therefore, made by parties of full age, previously to and in consideration of marriage, or made subsequently to marriage in pursuance of written articles,<sup>3</sup> stands on the footing of a purchase, and has equal validity. But a voluntary settlement is liable to be defeated by the creditors of the settlor, if he was so much indebted at the time as to bring the settlement within the provision of the statute of the 13th of Elizabeth,<sup>4</sup> already noticed,<sup>5</sup> by which the alienation of goods and chattels made for the purpose of delaying, hindering or defrauding creditors, is rendered void as against them; although by the phrase "goods and chattels," in the statute, is intended only such personal property as can be taken by the sheriff under an execution on a judgment.

But an antenuptial settlement upon the wife, in consideration of marriage, even though fraudulent upon the part of the husband, will prevail against his creditors, unless clear proof of the wife's participation in the fraud is adduced.<sup>7</sup>

Although a voluntary settlement may thus be defeated by creditors, yet, when once completed, it is binding on the settlor, who cannot by any means undo it.<sup>8</sup> Thus, in one case,<sup>9</sup> a maiden lady, not immediately contemplating marriage, but thinking such an event possible, transferred a sum of stock into the names of trustees in trust for herself until she should marry, and, after her marriage,

<sup>1</sup> *Fenwick v. Greewell*, 10 Beav., 412; *Brumridge v. Brumridge*, 27 Beav., 5.

<sup>2</sup> *Ante*, p. 116.

<sup>3</sup> Stat. 29, Car. II., c. 3, s. 4. See *ante*, p. 118-119.

<sup>4</sup> Stat. 13 Eliz., c. 5; *Skarf v. Soulby*, 1 Macn. & G., 364.

<sup>5</sup> *Ante*, p. 97.

<sup>6</sup> *Sims v. Thomas*, 2 Ad. & E., 536 (29 E. C. L.). See *ante*, p. 98.

<sup>7</sup> *Prewitt v. Wilson*, 103 U. S., 22.

<sup>8</sup> *Ellison v. Ellison*, 6 Ves., 656; *Edwards v. Jones*, 1 Myl. & Cr., 226; *Newton v. Askew*, 11 Beav., 145; *Kekewich v. Manning*, 1 De G., M. & G., 176; *Pentley v. Mackay*, 15 Beav., 12; *Bridge v. Bridge*, 16 Beav., 315; *Re Way's Settlement*, Lda. Jus., 13 W. R., 149; s. c., 2 De G., J. & S., 365.

<sup>9</sup> *Bill v. Cureton*, 2 Myl. & K., 503. See also *Petre v. Espinasse*, 2 Myl. & K., 496; *M'Donnell v. Hesilridge*, 16 Beav., 346; *Donaldson v. Donaldson*, Kay, 711.

in trust for her separate use for her life, free from the control of any person or persons with whom she might intermarry, and, after her decease, upon trusts for the benefit of any such husband, and her child or children by any husband or husbands. She afterwards, being still unmarried, filed a bill in Chancery, praying that the settlement might be delivered up to her to be cancelled, and that the stock might be ordered to be retransferred by the trustees. But the court held that she was bound by the settlement she had made, and was not entitled to any assistance to release her from it.

If, however, the object of the settlor is merely his own benefit or convenience, the settlement will be revocable by him at his pleasure. Thus, where a man, without any communication with his creditors, puts property into the hands of trustees for the purpose of paying his debts, his object is said to be, not to benefit his creditors, but to benefit himself by the payment of his debts.<sup>1</sup> He may accordingly revoke the trust thus created,<sup>2</sup> so long as the creditors remain in ignorance of it.<sup>3</sup> This rule, however, though well established, seems to attribute to debtors a somewhat light estimation of the claims of their creditors; and there appears to be no disposition in the courts to extend it.<sup>4</sup>

The statute of Elizabeth,<sup>5</sup> by which voluntary settlements of lands and other hereditaments are void as against subsequent purchasers for valuable consideration, though it extends to chattels real,<sup>6</sup> does not apply to purely personal estate.<sup>7</sup> A voluntary set-

<sup>1</sup> Per Sir C. Pepys, *M. R.*, 2 *Myl. & K.*, 511; cited by Wigram, V.-C., in *Hughes v. Stubbs*, 1 *Hare*, 479.

<sup>2</sup> *Garrard v. Lord Lauderdale*, 3 *Sim.*, 1; *Acton v. Woodgate*, 2 *Myl. & K.*, 492; *Ravenshaw v. Hollier*, 7 *Sim.*, 2; *Law v. Bagwell*, 4 *Dru. & Warren*, 398; *Smith v. Keating*, 6 *C. B.*, 136 (60 *E. C. L.*); *Driver v. Mawdesley*, 16 *Sim.*, 511.

<sup>3</sup> *Browne v. Cavendish*, 1 *Jones & Lat.*, 606, 635; *Griffith v. Ricketts*, 7 *Hare*, 299, 307; *Mackinnon v. Stewart*, 1 *Sim.*, *N. C.*, 76, 89, 90; *Harland v. Blinks*, 15 *Q. B.*, 713 (69 *E. C. L.*); *Smith v. Hurst*, 10 *Hare*, 30. But see *Cornthwaite v. Frith*, 4 *De G. & Sm.*, 552.

<sup>4</sup> See *Wilding v. Richards*, 1 *Coll.*, 661; *Simmonds v. Palles*, 2 *Jones & Lat.*, 489; *Kirwan v. Daniel*, 5 *Hare*, 493, 499-501.

<sup>5</sup> Stat. 27 *Eliz.*, c. 4; *Williams' Real Property*, 56, 1st ed.; 59, 2d ed.; 62, 3d and 4th eds.; 67, 5th ed.; 71, 6th ed.; 73, 7th ed.; 74, 8th ed.; 6th *Am. ed.*, 62.

<sup>6</sup> *Co. Litt.*, 3 b; *Burrell's case*, 6 *Rep.*, 72.

<sup>7</sup> *Bill v. Cureton*, 2 *Myl. & K.*, 512.

On the subject of voluntary settlements of personal estates, and that their validity or invalidity is, in this country, as a general thing, determined by the same rules

tlement of personal estate cannot, therefore, be defeated by a subsequent sale of the property by the settlor.

which regulate such settlements of land, see *Bryard et al. v. Hoffman et al.*, 4 Johns. Ch., 450; *Bank U. S. et al. v. Huth*, 4 B. Mon., 444; *Bohn v. Headley*, 7 Har. & Johns., 257; *Toumin v. Buchanan's Exr.*, 1 Stew., 67; *Backhouse's Admr. v. Jett's Admr.*, 1 Brockenb., 500; *Thayer v. Thayer et al.*, 14 Vt., 107; *Davis v. Payne's Admr.*, 4 Rand., 332; *Huston, Admr., v. Cantrill et al.*, 11 Leigh, 157; *Bentley et al. v. Harris, Admr.*, 2 Gratt., 357; *Beckham v. Secrest*, 2 Rich. Eq., 54; *Worthington et al. v. Shipley*, 5 Gill, 445; *Fleming v. Townsend*, 6 Geo., 103; *Wilson v. Buchanan*, 7 Gratt., 334; *Smith v. Stern*, 18 Pa. St., 360; *McVicker v. May*, 3 *Ibid.*, 227; *Penrod v. Morrison, Admr.*, 2 P. & W., 127; *Clemens v. Davis*, 7 Pa. St., 264; *Streeper v. Eckert*, 2 Whart., 302; *Stark v. Ward*, 3 Pa. St., 328; *Forsyth v. Matthews*, 12 *Ibid.*, 100.—G. & W.



## CHAPTER II.

### OF JOINT OWNERSHIP AND JOINT LIABILITY.

There may be a joint ownership of any kind of personal property, in the same manner as there may be a joint tenancy of real estate;<sup>1</sup> and the four unities of *possession, interest, title and time*, which characterize a joint tenancy of real estate, apply also to a joint ownership of chattels. If personal property, whether in possession or in action, be given to A. and B. simply, they will be joint owners, having equal rights, as between themselves, during the joint ownership, and being, with respect to all other persons than themselves, in the position of one single owner. Hence, it follows, that if a bond or covenant be given or made to two or more jointly, they must all join in suing upon it;<sup>2</sup> and a release by one of them to the obligor is sufficient to bar them all.<sup>3</sup> As a further consequence of the unity of a joint ownership, the important right of survivorship, which distinguishes a joint tenancy of real estate, belongs also to a joint ownership of personal property. Whether the subject of the joint ownership be a chattel real, as a lease, or a chose in possession, as a horse, or a chose in action, as a debt or legacy, the surviving joint owner will be entitled to the whole, unaffected by any disposition which the deceased joint owner may have made by his will, unless the joint tenancy should have been previously severed in the lifetime of both the parties.<sup>4</sup> And for this reason trustees of settlements of personal estate are always made joint owners, in order that the surviving trustees may take the entire fund, rather than that the executors or administrators of

<sup>1</sup> See Williams' Real Property, 99, 1st ed.; 104, 2d ed.; 109, 3d and 4th eds.; 114, 5th ed.; 120, 6th ed.; 123, 7th ed.; 128, 8th ed.; 6th Am. ed., 107 *et seq.*

<sup>2</sup> Slingsby's Case, 5 Rep., 18 b; Petrie v. Bury 3 B. & C., 343 (10 E. C. L.); 1 Wms. Saund., 291 i.

<sup>3</sup> 2 Rol. Abr., 410 (D.), pl. 1, 5.

<sup>4</sup> Litt. sects., 281, 282; Lady Shore v. Billingsley, 1 Vern., 482; Willing v. Baine, 3 P. Wms., 115; Morley v. Bird, 3 Ves., 629; Williams v. Henshaw, 1 John. & H., 546.

any trustee who may happen to die should have any right to intermeddle with the share of the deceased.

If the joint ownership be created by a will, it is not necessary that the share of all the joint owners should vest at the same time. Thus under a bequest to A. for life, and after his decease to the issue<sup>1</sup> or children<sup>2</sup> of B., without words of severance, all the issue or children, born in A.'s lifetime, will become entitled jointly, though some may not be living when the shares of the others become vested interests. On the decease of any of them, therefore, before payment, the survivors will become entitled to their shares. A similar exception to the unity of *time* occurs also in the case of a devise of real estate by will.<sup>3</sup>

In analogy to the rule by which a joint estate in fee-simple in lands is created by a limitation to two or more, *their heirs and assigns*, it is customary with conveyancers to make a gift of personal estate to two or more jointly by limiting it to them, *their executors, administrators and assigns*. This, however, though usual is not strictly necessary. In ill-framed instruments, limitations of personalty are sometimes made to two persons, "and the survivor of them, and the executors and administrators of such survivor." If, however, the persons are simply made joint owners, the law will be sufficient of itself to carry the property to the survivor. Bonds and covenants, when intended to be given or made to two or more jointly, are in like manner usually given or made to the obligees or covenantees, *their executors and administrators*; or, if the subject-matter be assignable, to them, *their executors, administrators and assigns*. But, when entered into with two or more persons, bonds or covenants cannot, as respects the obligees or covenantees, be joint or several, at their election, for one and the same cause; for otherwise the court would be in doubt for which of them to give judgment.<sup>4</sup> And whether a covenant be joint or several depends much more upon the subject-matter than upon the words employed. If each of the covenantees has a separate interest, each may have a separate cause of action, and the covenant will accordingly in such a case be several, though expressed to be made

<sup>1</sup> *Bridge v. Yates*, 12 Sim., 645.

<sup>2</sup> *Amies v. Skillern*, 14 Sim., 428.

<sup>3</sup> See *Williams' Real Property*, 102, 1st ed.; 107, 2d ed.; 112, 3d and 4th eds.; 117, 5th ed.; 123, 6th ed.; 126, 7th ed.; 131, 8th ed.; 6th Am. ed., 110.

<sup>4</sup> *Slingsby's Case*, 5 Rep., 19 a.; *Anderson v. Martindale*, 1 East, 501.

with the covenantees jointly and severally.<sup>1</sup> But, if each of the covenantees has not a separate cause of action, all of them must concur in suing upon the covenant, even although it be expressed to be made with some of them, "and as a separate covenant" with the other;<sup>2</sup> for if all may sue, all must.<sup>3</sup>

An exception to the right of survivorship between joint-owners occurs in the case of partners in trade or manufacturers, expressed in the maxim *jus accrescendi inter mercatores locum non habet*. For the encouragement of trade, the beneficial interest of a partner passes upon his death to his personal representatives; and, according to the language usually employed by the text-books,<sup>4</sup> they become tenants in common with the surviving partners of all choses in possession belonging to the partnership. In *Buckley v. Barber*,<sup>5</sup> this is declared to be the weight of authority, and, as a consequence, it was held in that case that such choses in possession, sold by the surviving partners for payment of partnership debts, are nevertheless liable, in the hands of the purchaser, to the claims of the personal representatives of the deceased partner, and of their judgment creditors as well, to the extent of his moiety or other interest in them. And this view has been adopted by some of the American courts.<sup>6</sup> The doctrine of *Buckley v. Barber* has, however, been disapproved in England,<sup>7</sup> is opposed by the weight of American authority,<sup>8</sup> and is incapable of reconciliation with the universally conceded rules of partnership, that the partners respec-

<sup>1</sup> 5 Rep., 19 a.; 1 Wms. Saund., 155 a, n. (1).

<sup>2</sup> *Slingsby's Case*, 5 Rep., 18 b.; *Anderson v. Martindale*, 1 East, 497; *Foley v. Addenbrooke*, 4 Q. B., 197 (45 E. C. L.); *Hopkinson v. Lee*, 6 Q. B., 964 (51 E. C. L.); *Bradburne v. Botfield*, 14 M. & W., 559; *Wakefield v. Brown*, 9 Q. B., 209 (58 E. C. L.); *Keightly v. Watson*, 3 Exch. Rep., 716.

<sup>3</sup> *Foley v. Addenbrooke*, 4 Q. B., 208 (45 E. C. L.); *Wetherell v. Langston*, 1 Exch. Rep., 634; *Pugh v. Stringfield*, 3 C. B. N. S., 2 (91 E. C. L.)

<sup>4</sup> 2 Bl. Com., 399; 3 Kent's Com., 37; Story on Partnership, s. 90.

<sup>5</sup> 6 Exch., 164. See, also, Co. Litt., 182, a; *Rex v. Collector*, 2 M. & Selw., 223.

<sup>6</sup> *Tremper v. Conklin*, 44 N. Y., 58; *Wilson v. Soper*, 13 B. Mon., 411; s. c., 56 Am. Dec., 573; *Adams v. Ward*, 26 Ark., 135; *Skipwith v. Lea*, 16 La. Ann., 247.

<sup>7</sup> Lindley on Partnership, 342, note x.

<sup>8</sup> *Fitzpatrick v. Flannagan*, 106 U. S., 648; *Emerson v. Senter*, 118 U. S., 2, 8; *Betts v. June*, 51 N. Y., 274; *Adams v. Hackett*, 27 N. H., 289; s. c., 59 Am. Dec., 376; *Oram v. Rothermel*, 98 Pa. St., 300; *Smith v. Wood*, 31 Md., 293; *Connor v. Allen*, Harr. Ch., 371; *Bassett v. Miller*, 39 Mich., 133; *Mendenhall v. Benbow* 84 N. C., 646.

tively do not own any share in the specific chattels or property belonging to the firm, but only a share in what may remain of the partnership assets after payment and discharge of all its debts and liabilities,<sup>1</sup> and that no separate creditor of any partner can acquire any right, title or interest in such property, specifically, but only in his debtor's share in such ultimate balance.<sup>2</sup> The true rule in regard to the choses in possession, it is conceived, is the same as that which, the authorities agree,<sup>3</sup> applies to the choses in action, namely; there is a legal survivorship, enabling the survivors, and the survivors only, to hold, sue for, recover, and dispose of, all assets, and to apply them and their proceeds to the discharge of liabilities, but with an accountability in equity to the personal representative of the deceased partner for his share of the surplus. If the assets are insufficient to pay the debts, the survivors, who alone can be sued by the creditors, there being a legal survivorship of liabilities as well as of assets, may, in equity, enforce contribution from the estate of the deceased partner; and, in that tribunal, the creditors may resort to the deceased partner's estate in the first instance, if the survivors are insolvent and, it seems, even if they be not so, leaving the personal representative to enforce contribution from them.<sup>4</sup> The survivor may make a valid sale of real estate owned by the partnership, or bought with its funds; and, although he cannot convey the legal title which, on the death of his co-partner, passed to the heirs or devisees of the latter, the purchaser from him can, in equity, compel conveyance by them to him.<sup>5</sup> The survivor is not entitled to compensation for his services for settling up the business of the partnership.<sup>6</sup> Upon application of the representatives of the deceased partner, showing mismanagement or danger to the partnership effects, the court of equity will appoint a receiver to take charge of them, and wind up the business.<sup>7</sup>

As a general rule, joint ownership is not favored in equity, on

<sup>1</sup> 3 Kent Com., 37; Story on Partnership, s. 97.

<sup>2</sup> *Ibid.*

<sup>3</sup> Story on Partnership, s. 346; Lindley on Partnership, 341-2; 3 Kent Com., 37.

<sup>4</sup> *Wilkinson v. Henderson*, 1 Mylne & K., 582.

<sup>5</sup> *Shanks v. Klein*, 104 U. S., 18.

<sup>6</sup> *Denver v. Roane*, 99 U. S., 355.

<sup>7</sup> *Walker v. House*, 4 Md. Ch. 39; *Miller v. Jones*, 39 Ill., 54; *Connor v. Allen*, Harr. ch. 371; and see *Renton v. Chaplain*, 1 Stock., 62; *Hamill v. Hamill*, 27 Md., 679.

account of the right of survivorship which attaches to it.<sup>1</sup> If, therefore, two persons advance money by way of mortgage or otherwise and take the security to themselves jointly, and one of them die, the survivor will be a trustee in equity for the representatives of the deceased, of the share advanced by him.<sup>2</sup> And, when the intention is that the survivor should receive the whole, a declaration should be inserted that his receipt alone shall be a sufficient discharge for the money secured.<sup>3</sup>

An ownership in common (or, as it is usually styled in analogy to real estate, a tenancy in common) of chattels may arise either from the severance of a joint ownership, or from a gift to two or more to hold in common.<sup>4</sup> As, however, a chose in action is inalienable at law, a joint ownership of a chose in action cannot be severed at law by either, or even by both, of the joint owners. Thus in case of the bankruptcy of a joint creditor, by which all his estate becomes vested in his assignees, an action against the debtor must be brought in the joint names, formerly of the assignees, and now of the creditors' trustees and the other joint creditors.<sup>5</sup> And, if two joint creditors should become bankrupt, the action must be brought in the joint names of the assignees of both of them.<sup>6</sup> A tenancy in common cannot in fact exist at law of a chose in action. A. may owe 20*l.* to B. and C. jointly, or he may owe 10*l.* to B. and 10*l.* to C.; but he cannot owe 20*l.* to B. and C. in common. If each has a several cause of action, each must sue separately. In equity, however, the case is different. Though B. and C. are joint owners at law, in equity they may be owners in common; and, on the decease of either of them, his share may in equity belong to his representative, instead of accruing beneficially to his companion. And, with regard to letters-patent, it appears that even at law they may be the subject of an ownership in common, and that the assignee of an undivided share may alone sue for an infringement of that part

<sup>1</sup> *Partridge v. Powlet*, 2 Atk., 55; *Rigden v. Vallier*, 2 Ves. Sr., 258.

<sup>2</sup> *Petty v. Styward*, 1 Ch. Rep., 57; 1 Eq. Ca. Ab., 290.

<sup>3</sup> See *Williams' Real Property* 342, 1st ed.; 343, 2d ed.; 355, 3d ed.; 361, 4th ed.; 372, 5th ed.; 394, 6th ed.; 401, 7th ed.; 420, 8th ed.; 6th Am. ed., 340.

<sup>4</sup> *Litt.*, s. 321.

<sup>5</sup> *Thomason v. Frere*, 10 East, 418. See stat. 32 & 33 Vict., c. 71, s. 105, and the repealed stat. 12 & 13 Vict., c. 106, s. 152, repealing stat. 5 & 6 Vict., c. 122, s. 31.

<sup>6</sup> See *Hancock v. Heywood*, 3 Term Rep., 433.

of the patent, without joining the persons interested in the remaining shares.<sup>1</sup> And one owner in common of letters-patent can work the patent on his own account, without the concurrence of the others.<sup>2</sup> In deciding whether a tenancy in common has been created by deed, there is very seldom any difficulty. But in wills, where greater indulgence is given to informal words, the rule is, that any words which denote an intention to give to each of the legatees a distinct interest in the subject of the gift, will be sufficient to make them tenants in common. Thus a gift by will to two or more persons "equally to be divided between them,"<sup>3</sup> or simply "between them,"<sup>4</sup> or "in joint and equal proportions,"<sup>5</sup> or "equally,"<sup>6</sup> or "respectively,"<sup>7</sup> or "to be enjoyed alike,"<sup>8</sup> will make such persons tenants in common, and not joint tenants, as they would have been without the insertion of such words. In this respect the rule is the same whether the subject of the devise or bequest be real or personal estate.<sup>9</sup>

Owners in common of personal estate, like tenants in common of lands, have merely a unity of possession: the interest of one may be larger or smaller than that of the other, one having, for instance, one-third, and the other two-thirds of the property. So the title need not be the same, as one may have been originally a joint tenant with a third person, who may have severed the joint tenancy by assigning his moiety to the other. The right of survivorship, which springs from a unity of interest and title, has accordingly no place between owners in common.<sup>10</sup>

Connected with the subject of joint ownership is that of joint liability. Two or more persons may be jointly liable to the same debt or demand. In a joint bond, the obligors, according to the

<sup>1</sup> *Dannicliiff v. Mallet*, 7 C. B. N. S., 209 (97 E. C. L.); *Walton v. Lavater*, 8 C. B. N. S., 162 (98 E. C. L.).

<sup>2</sup> *Mathers v. Green*, L. C., 11 Jur. N. S., 845.

<sup>3</sup> *Blisset v. Cranwell*, 1 Salk., 226; *Phillips v. Philips*, 2 Vern. 430; s. c., 1 Eq. Ca. Abr., 292, pl. 6; s. c., 1 P. Wms., 34.

<sup>4</sup> *Lashbrook v. Cock*, 2 Mer., 70.

<sup>5</sup> *Ettricke v. Ettricke*, 2 Amb., 656.

<sup>6</sup> *Lewen v. Dodd*, Cro. Eliz., 443.

<sup>7</sup> *Davenport v. Oldis*, 1 Atk., 580; *Marryat v. Townly*, 1 Ves., Sr., 104.

<sup>8</sup> *Loveacres d. Mudge v. Blight*, Cowp., 352.

<sup>9</sup> See 2 Jarm. Wills, 161 *et seq.* 1st ed.; 211, 2d ed.; 231, 3d ed.

<sup>10</sup> Litt., s. 321.

usual form, bind themselves, their heirs, executors and administrators jointly; and, in a joint covenant, they in like manner covenant for themselves, their heirs, executors and administrators jointly. In every case of joint liability, each is liable for the whole debt,<sup>1</sup> yet they are all, like joint owners, considered as one person. They must accordingly all be sued together during their joint lives;<sup>2</sup> and a release to one of them will discharge them all.<sup>3</sup> The fact of one joint debtor being beyond the seas at the time when the cause of action accrues, will not deprive the others of the benefit of the Statutes of Limitation; and the recovery of judgment against any who were not beyond seas, will be no bar to an action against the absent debtors on their return. An acknowledgment, or a new promise, by one or more of the partners, after dissolution of the partnership, will not remove the bar of the Statutes of Limitation as to the others.<sup>4</sup> Nor do admissions by one, after dissolution, bind the others,<sup>5</sup> unless the partner making them is in the exercise of an authority, either express or implied, to settle the business of the partnership.<sup>6</sup> After the decease of any one joint debtor, the survivors or survivor of them may still be sued for the whole debt, as though the deceased had no share in it,<sup>7</sup> and the estate of the deceased will be discharged from all liability both at law and in equity.<sup>8</sup> So, if a judgment be obtained against two or more jointly, and one of them die, the estate of the survivor or survivors, whether real or personal, will be exclusively liable to be taken in execution; although the real estate of the deceased, being bound from the date of the judgment, is liable to contribute equally with the real estate of the survivors.<sup>9</sup>

<sup>1</sup> 1 B. & Ald., 35.

<sup>2</sup> 1 Wms. Saund., 291 b, n. (4).

<sup>3</sup> 2 Rol. Abr., 412 (G), pl. 4; *Clayton v. Kynaston*, 2 Salk., 574; 2 Wms. Saund., 47 gg, n. (1); *Warwick v. Richardson*, 14 Sim., 281.

<sup>4</sup> *Atkins v. Tredgold*, 2 B. & C., 23; *Slater v. Lawson*, 1 B. & Ad., 396; *Bell v. Morrison*, 1 Pet., 351; *Reppert v. Colvin*, 48 Pa. St., 248; *Van Keuren v. Parmelee*, 2 Comst., 523; *contra*, *Smith v. Ludlow*, 6 Johns., 267.

<sup>5</sup> *Bell v. Morrison*, *supra*; *Thompson v. Bowman*, 6 Wall., 316; *Ward v. Howell*, 5 H. & J., 60; *Hackley v. Patrick*, 3 Johns., 536; *Gleason v. Clark*, 9 Cow., 57; *Shelton v. Coche*, 3 Munf., 191; *Burns v. McKenzie*, 23 Cal., 101; *Yandes v. Lefavour*, 2 Blackf., 371.

<sup>6</sup> *Reppert v. Colvin*, 48 Pa. St., 248; *Draper v. Bissell*, 3 McL., 275.

<sup>7</sup> *Richards v. Heather*, 1 B. & Ald., 29.

<sup>8</sup> *Richardson v. Horton*, 6 Beav., 185; *Wilmer v. Currey*, 2 DeG. & Sm., 347; *Crossley v. Dobson*, 2 DeG. & Sm., 486; *Other v. Iveson*, 3 Drew., 177.

<sup>9</sup> *Harbert's Case*, 3 Rep., 14 b; *Smarte v. Edsun*, 1 Lev., 30; 2 Wms. Saund., 51.

A liability, however, may be both joint and several at the same time; and, as such a liability is more beneficial to the creditor, it is more usual than a liability which is simply joint. A joint and several bond usually runs in this form: "for which payment well and truly to be made, we bind ourselves, and each of us, and the heirs, executors and administrators of us and each of us, jointly and severally;" or, if there is a larger number of obligors, say five, the better form is: "for which payment well and truly to be made, we bind ourselves, and each of us, and any two, three, or four of us, and the heirs, executors and administrators of us, and of each of us, and of any two, three, or four of us, jointly and severally." In the case of a joint and several bond, an action may be brought against all the obligors, or against any one, two, three or four of them whom the obligee may select; otherwise he must have sued either all of them jointly, or any one of them singly.<sup>1</sup> A joint and several covenant is usually in this form: "And the said A. B. and C. D. do hereby, for themselves, their heirs, executors and administrators jointly, and each of them doth hereby for himself respectively, and for his respective heirs, executors and administrators, covenant," etc.; or, if there are more than two covenantors, the better form is, for the reason above given: "And the said A. B., C. D., E. F. and G. H., do hereby, for themselves, their heirs, executors and administrators jointly, and any two or three of them, do hereby, for themselves, their heirs, executors and administrators jointly, and each of them doth hereby for himself respectively, and for his respective heirs, executors and administrators, covenant," etc. In all cases of joint and several liability, each party is individually liable, and may be sued alone for the whole debt, or, if the creditor please, he may sue them all jointly. In consequence of the joint liability, a release of one of the debtors will discharge them all; and, as they are all discharged, the creditor will thenceforth be unable even to sue any of them severally.<sup>2</sup> As, however, the several liability is distinct from the joint, it is competent to the creditor, in releasing one of the debtors, expressly to reserve his remedy against the others; and, in this case, each of the remaining debtors will con-

<sup>1</sup> Per Buller, J., in *Streatfield v. Halliday*, 3 Term Rep., 782.

<sup>2</sup> 2 Rol. Abr., 412 (G), pl. 5; *Clayton v. Kynaston*, 2 Salk., 574; *Nicholson v. Revill*, 4 Ad. & E., 683 (31 E. C. L.); s. c., *N. & M.*, 192; *Evans v. Bremridge*, 2 Kay & John, 174; affirmed, 8 DeG., M. & G., 100.



tinue severally liable.<sup>1</sup> So he may covenant with one of the debtors never to sue him; and in such a case he will retain his remedy against the others severally.<sup>2</sup> On account of the several liability, the estate of a person who has become jointly and severally bound is not discharged by his decease in the lifetime of his co-debtors, but still remains liable to the entire debt as respects the creditor, and to a portion of it as respects the surviving co-debtors.

One of the most usual means of incurring a joint and several liability is the entering into a partnership. At law the liability of partners is joint only as to debts incurred by the partnership; so that they ought all to be joined as defendants to an action at law for recovering any such debt.<sup>3</sup> But a dormant partner, whose name may or may not be known, may either be joined or not at the pleasure of the creditor;<sup>4</sup> unless the contract be under seal, in which case, as the deed is itself the contract, and not merely evidence of it,<sup>5</sup> those only can be sued on it who have sealed and delivered it. In equity, however, in favor of creditors, all partnership debts are considered to be both joint and several. On the decease of a partner, therefore, his estate will be liable in equity to all the partnership debts incurred previous to his decease;<sup>6</sup> and the creditors may, if they please, resort in the first instance to the estate of the deceased, leaving it to his representatives to recover from the surviving partners their share of the debts.<sup>7</sup> It seems, however, that the separate creditors of the deceased partner would first be paid in full out of the estate, before its application to the payment of any of the debts of the partnership.<sup>8</sup>

The liability to the debts of a partnership may be incurred by

<sup>1</sup> *Ex parte Gifford*, 6 Ves., 807; *Thompson v. Lack*, 3 C. B., 540 (54 E. C. L.); *Kearsley v. Cole*, 16 M. & W., 136; *Price v. Barker*, Q. B., 1 Jur., N. S., 775; s. c., 4 E. & B., 760 (82 E. C. L.); *Willis v. De Castro*, 4 C. B., N. S., 216 (93 E. C. L.).

<sup>2</sup> *Lacy v. Kynaston*, 2 Salk., 575; 2 Wms. Saund., 48, n. (1).

<sup>3</sup> See *Rice v. Shute*, 5 Burr., 2611; 1 Wms. Saund., 291 b, n. (4).

<sup>4</sup> *De Mautort v. Saunders*, 1 B. & Ad., 398 (20 E. C. L.); *Beckham v. Drake*, 9 M. & W., 79; *Drake v. Beckham*, 11 M. & W., 315.

<sup>5</sup> *Ante*, 118, 126.

<sup>6</sup> *Devaynes v. Noble*, 1 Meriv., 529, 563; s. c., 2 Russ. & My., 495.

<sup>7</sup> *Wilkinson v. Henderson*, 1 Myl. & K., 582; *Braithwaite v. Britain*, 1 Keen, 206; *Thorpe v. Jackson*, 2 You. & Col., 553; *Way v. Bassett*, 5 Hare, 55.

<sup>8</sup> *Gray v. Chiswell*, 9 Ves., 118; *Brown v. Weatherby*, 12 Sim., 6, 10; *Ridgway v. Clare*, 19 Beav., 111; *Whittingstall v. Grover*, M. R., 10 W. R., 53; *Lodge v. Pritchard*, 4 Giff., 294.

being an ostensible partner, although no share of the profits be received. Thus, if a person allow his name to be used as one of the firm,<sup>1</sup> or to be painted over the door of a shop,<sup>2</sup> he will be liable to the debts of the firm; for credit may thus be given to the firm on the strength of his character as a solvent person. On the same principle, if a person have once been known to be a partner in the firm,<sup>3</sup> his liability to its debts will continue after his withdrawal, unless he takes proper means to inform the creditors that he has ceased to be a partner.<sup>4</sup> But the circumstance of the name of a deceased partner remaining in the firm will not render his estate liable to the debts of the survivors.<sup>5</sup> And, if a trader direct by his will that his trade shall be carried on by his executor, the executor, who ostensibly carries on the trade, will be liable for the debts he may thereby incur as fully as if he were carrying on the trade for his own benefit; but so much only of the estate of the testator will be liable to such debts as he may have directed to be employed in the business.<sup>7</sup> The rest of the testator's estate is held to be exempt, on the ground of the great inconvenience which would arise from holding it liable after its distribution amongst the legatees. But, in strict principle, this exemption is at variance with the rule next stated, that a liability is incurred by any participation in the profits.

A liability to the debts of a partnership is incurred by a participation in the profits, although the circumstance of such participation be unknown to the creditors.<sup>8</sup> It is enough that the business was carried on *on behalf* of the participator.<sup>9</sup> Thus, if a person

<sup>1</sup> *Parkin v. Carruthers*, 3 Esp., 243; *Young v. Azzell*, cited 2 H. Black., 242.

<sup>2</sup> See *M'Iver v. Humble*, 16 East, 169, 174.

<sup>3</sup> *Evans v. Drummond*, 4 Esp., 89; *Brooke v. Enderby*, 2 B. & B., 70 (6 E. C. L.); s. c., 4 Moore, 501; *Lacy v. McNeile*, 4 Dowl. & R., 7 (16 E. C. L.); *Carter v. Whalley*, 1 B. & Ad., 11 (20 E. C. L.).

<sup>4</sup> *Godfrey v. Turnbull*, 1 Esp., 371; *M'Iver v. Humble*, 16 East, 169.

<sup>5</sup> *Vulliamy v. Noble*, 3 Mer., 614; *Webster v. Webster*, 3 Swanst., 490, n.

<sup>6</sup> 10 Ves., 119. And at law he will be liable, though his name do not appear; *Whitman v. Townroe*, 1 M. & Selw. 412.

<sup>7</sup> *Ex parte Garland*, 10 Ves., 110; *Ex parte Richardson*, Buck, 202; *Cutbush v. Cutbush*, 1 Beav., 184; *Re Butterfield*, 11 Jurist, 955; *Kirkman v. Booth*, 11 Beav., 273; *M'Neillie v. Acton*, 4 DeG., M. & G., 744.

<sup>8</sup> *Beckham v. Drake*, 9 M. & W., 79; *Drake v. Beckham*, 11 M. & W., 315.

<sup>9</sup> *Kilshaw v. Jukes*, 3 B. & S., 847 (113 E. C. L.).

place money in a partnership,<sup>1</sup> or leave it there on retiring,<sup>2</sup> with a stipulation to have a compensation for it, under whatever name, subject to abatement or enlargement as the profits may fluctuate, he is liable as a partner. If, however, he leave no money in the concern, but is to receive a compensation for his services, or otherwise, a nice distinction has been drawn between taking a share of the profits as such and taking a percentage upon, or a salary varying with, the profits. He who takes a share of the profits as such is liable as a partner;<sup>3</sup> but he who takes an equivalent in the shape of percentage or salary, though varying with the profits, escapes the liability.<sup>4</sup> And, if a trading concern be carried on for the benefit of creditors, the creditors are not, from the mere circumstance of their debts being paid out of the profits, liable as partners for the debts incurred.<sup>5</sup>

When the relation of partners has been established between two or more persons, either ostensibly or by participation in profit, each incurs liability from the acts and dealings of the other in the ordinary course of business. For any one partner may buy, sell<sup>6</sup> or pledge goods;<sup>7</sup> draw,<sup>8</sup> accept<sup>9</sup> or indorse<sup>10</sup> bills of exchange and promissory notes; give guarantees,<sup>11</sup> receive moneys<sup>12</sup> and release or compound for debts<sup>13</sup> in the name<sup>14</sup> and on the account of the firm, in the ordinary course of business. Each partner is also answerable

<sup>1</sup> *Grace v. Smith*, 2 Wm. Black., 998, 1001; *Waugh v. Carver*, 2 H. Black., 235.

<sup>2</sup> *Re Colbeck*, Buck, 48.

<sup>3</sup> *Ex parte Rowlandson*, 1 Rose, 89, 91; *Barry v. Nesham*, 3 C. B., 641 (54 E. C. L.); *Heyhoe v. Burge*, 9 C. B., 431 (67 E. C. L.); see, however, *Rawlinson v. Clarke*, 15 M. & W., 292.

<sup>4</sup> *Ex parte Hamper*, 17 Ves., 403; *Pott v. Eyton*, 3 C. B., 32 (54 E. C. L.); *Stocker v. Brockelbank*, 3 Macn. & G., 250.

<sup>5</sup> *Wheatcroft v. Hickman*, H. of L., 9 C. B. N. S., 47 (99 E. C. L.).

<sup>6</sup> *Hyat v. Hare*, Comb., 383; *Lambert's Case*, Godbolt, 244.

<sup>7</sup> *Reid v. Hollinshead*, 4 B. & C., 867 (10 E. C. L.).

<sup>8</sup> *Smith v. Jarvis*, 2 Ld. Raymond, 1484; *Re Clarke, Ex parte Buckley*, 14 M. & W., 469; s. c., 1 Phil., 562.

<sup>9</sup> *Pinkney v. Hall*, 1 Salk., 126; s. c., 1 Ld. Raym., 175; *Lloyd v. Ashby*, 2 B. & Ad., 23 (22 E. C. L.).

<sup>10</sup> *Swan v. Steele*, 7 East, 210; *Vere v. Ashby*, 10 B. & C., 288 (21 E. C. L.).

<sup>11</sup> *Ex parte Gurdorn*, 15 Ves.; 286; see *Halesham v. Young*, 5 Q. B., 833 (48 E. C. L.).

<sup>12</sup> *Duff v. East India Company*, 15 Ves., 198, 213.

<sup>13</sup> *Per Lord Kenyon*, 4 Term Rep., 519; *per Best*, C. J., 10 Moore, 393.

<sup>14</sup> *Kirk v. Blurton*, 9 M. & W., 284.

for the fraud of his co-partner in any matter relating to the business of the partnership.<sup>1</sup> And in like manner notice of any matter relating to the partnership, if given to one partner, is constructively notice to them all.<sup>2</sup> And any agreement between the partners, by which any one of them may be restrained from doing any act to pledge the credit of the firm, though binding as between themselves, will not be binding on any creditor<sup>3</sup> who may not have notice of it.<sup>4</sup> If, however, the transaction be not in the ordinary course of the business of the partnership, the other partners will not be liable as such in respect of it. Thus one partner cannot bind the firm by a submission to arbitration,<sup>5</sup> or by confessing a judgment;<sup>6</sup> and one partner has ordinarily no authority to execute a deed in the names of the others so as to bind the partnership.<sup>7</sup> So a farmer carrying on his business in partnership with another would not be liable on a bill of exchange drawn by his partner in the name of the partnership;<sup>8</sup> neither would a solicitor be liable on a bill drawn by his partner in the name of his firm, though given to secure a partnership debt;<sup>9</sup> for bill transactions form no part of the ordinary business of either farmers or solicitors. Again, there is no right or power implied by law in any of the directors of a joint-stock company to bind the company by drawing or accepting bills or notes;<sup>10</sup> and in like manner notice of any matter relating to the business of a joint-stock company given to any member, even a director, is not constructive notice to the company itself.<sup>11</sup> For

<sup>1</sup> *Willett v. Chambers*, Cowp., 814; *Stone v. Marsh*, 6 B. & C., 551 (13 E. C. L.); *Lovell v. Hicks*, 2 You. & Col., 481; *Blair v. Bromley*, 5 Hare, 542; s. c., 2 Phil. 354.

<sup>2</sup> Per Lord Ellenborough, 1 M. & Selw., 259.

<sup>3</sup> *Waugh v. Carver*, 2 H. Black., 235; *South Carolina Bank v. Case*, 8 B. & C., 427 (15 E. C. L.); *Hawken v. Bourne*, 8 M. & W., 703, 710.

<sup>4</sup> *Minnitt v. Whinery*, 5 Bro. Parl. Cas., 489; *Ex parte Darlington District Joint Stock Banking Company*, *In re Riches*, L. C. 11 Jur. N. S., 122. See also *Hogg v. Skeen*, 18 C. B. N. S., 426 (114 E. C. L.).

<sup>5</sup> *Stead v. Salt*, 3 Bing., 101 (11 E. C. L.); s. c., 10 J. B. Moore, 389.

<sup>6</sup> *Hambidge v. De la Crouée*, 3 C. B., 742 (54 E. C. L.).

<sup>7</sup> *Harrison v. Jackson*, 7 Term Rep., 207; see *Burn v. Burn*, 3 Ves., 573, 578.

<sup>8</sup> Per Littledale, J., 10 B. & C., 138 (21 E. C. L.).

<sup>9</sup> *Hedley v. Bainbridge*, 3 Q. B., 316 (43 E. C. L.).

<sup>10</sup> *Dickinson v. Valpy*, 10 B. & C., 123 (21 E. C. L.); *Bramah v. Roberts*, 3 Bing. N. C., 963 (32 E. C. L.).

<sup>11</sup> *Powles v. Page*, 3 C. B., 16 (54 E. C. L.); *Martin v. Sedgwick*, 9 Beav., 333.

joint-stock companies are essentially different from ordinary partnerships. It is not necessary that the directors should have any other power to bind the company by bills or notes than such as may be conferred on them by the charter or articles of association.<sup>1</sup> And the business of such companies is always carried on at an office for the purpose, and is not, like that of ordinary partnerships, confided to any one individual member.

<sup>1</sup> *Balfour v. Ernest*, 5 C. B. N. S., 601 (94 E. C. L.).

## CHAPTER III.

### OF A WILL.

ALL kinds of personal property may be bequeathed by will. This right, in its present extent, has been of very gradual and almost imperceptible growth; for anciently, by the general common law, a man who left a wife and children could not deprive them by his will of more than one equal third part of his personal property. If, however, he left a wife and no children, or children and no wife, he was then enabled to dispose of half, leaving the other half for the wife or for the children.<sup>1</sup> This ancient rule, however, gradually became subject to many exceptions, by the customs of particular places, until the rule itself took the place of an exception and became confined to such places as had a custom in its favor. These places, in later times, were the province of York, the principality of Wales, and the city of London; as to all which places, a general power of testamentary disposition was conferred by acts of parliament of William and Mary, Anne and George I.<sup>2</sup>

The ecclesiastical courts, as we shall hereafter see, very early acquired the right of determining as to the validity of wills of personal estate; and, in the exercise of this right, they generally followed the rules of the civil law. By this law males at the age of fourteen, and females at the age of twelve, were allowed, if of sufficient discretion, to make a testament;<sup>3</sup> and the same rule, accordingly, prevailed in this country with respect to wills of personal property,<sup>4</sup> although, by some authorities, seventeen and even eighteen was said to be the proper age.<sup>5</sup>

<sup>1</sup> 2 Black. Com., 492; Williams on Executors, pt. 1, bk. 1, c. 1. See also 1 C. P., Cooper's Reports, 539.

<sup>2</sup> Stat. 4 & 5 Will. & Mary, c. 2, explained by stat. 2 & 3 Anne, c. 5, for the province of York; stat. 7 & 8 Will. III., c. 38, for Wales; and stat. 11 Geo. I., c. 18, for London. See 2 Bl. Com., 493.

<sup>3</sup> Inst. lib. 2, tit. 12, s. 1; Dig. lib. 28, tit. 1, s. 5.

<sup>4</sup> 2 Bl. Com., 497.

<sup>5</sup> Co. Litt., 89 b, n. (6).

The questions, who may make a will, and how it is to be made, are best answered by a reference to the statutory provisions of each particular State.—G. & W.

Personal property was anciently of so little account that a will of it might be made by word of mouth, if proved by a sufficient number of witnesses, as well as by writing; and a will made by word of mouth was termed a nuncupative testament.<sup>1</sup> By the Statute of Frauds, however, a nuncupative testament, where the estate bequeathed exceeded the value of thirty pounds, was surrounded by so many requirements as to cause its complete disuse.<sup>2</sup> But no provision was made for guarding the execution of a written will of personal estate; although by the same statute<sup>3</sup> a will of real estate was required to be attested by three or four witnesses. No attestation, therefore, was required to a will of personal estate, nor was it even necessary that such a will should be signed by the testator. Thus, instructions for a will committed to writing, given by a person who died before the instrument could be formally executed, though such instructions were neither reduced into writing in the presence of the testator, nor ever read over to him, have been held to operate as fully as a will itself.<sup>4</sup> It was, however, provided by the Statute of Frauds that no will in writing of personal estate should be repealed or altered by word of mouth only, except the same were, in the life of the testator, committed to writing, and after the writing thereof, read unto the testator, and allowed by him, and proved to be so done by three witnesses at the least.<sup>5</sup>

A will of personal estate is required to be made according to the law of the domicile of the testator at the time of his decease.<sup>6</sup> A person's domicile is the place which he makes his home.

Connected with the subject of wills is that of donations *mortis causa*, which may here be noticed. A *donatio mortis causa* is a gift made in contemplation of death, to be absolute only in case of the death of the giver.<sup>7</sup> Being a gift, it can be made only of chattels, the property in which passes by delivery;<sup>8</sup> although a

<sup>1</sup> Wentworth's Executors, 11 *et seq.*; Williams on Executors, pt. 1, bk. 2, c. 2, s. 6.

<sup>2</sup> Stat. 29 Car. II., c. 3, s. 19-21, explained by stat. 4 Anne, c. 16, s. 14.

<sup>3</sup> Sect. 5.

<sup>4</sup> Carey v. Askew, 3 Bro. C. C., 58; s. c., 1 Cox, 241.

<sup>5</sup> Stat. 29, Car. II., c. 3, s. 22.

<sup>6</sup> Stanley v. Bernes, 3 Hagg., 373.

<sup>7</sup> Inst. tit. 7, De Donationibus, cited by Lord Loughborough, in Tate v. Hilbert, 2 Ves., Jr., 119; Walter v. Hodge, 2 Swanst., 99.

<sup>8</sup> See *ante*, pp. 55, 59; Miller v. Miller, 3 P. Wms., 356.

bond debt has, contrary to this principle,<sup>1</sup> been allowed to pass by way of *donatio mortis causa* by delivery of the bond.<sup>2</sup> And a policy of life assurance has also recently been held a proper subject for such a gift,<sup>3</sup> also bills or notes though payable to order and unindorsed.<sup>4</sup> An actual or constructive delivery of the subject of the gift to the donee is essential to a *donatio mortis causa*;<sup>5</sup> it must also be made in expectation of the donor's decease,<sup>6</sup> and must be on condition that the gift be absolute only on that event.<sup>7</sup> It is no objection, however, that the donation is clogged with a trust to be performed by the donee.<sup>8</sup> A *donatio mortis causa* is revocable by the donor during his life,<sup>9</sup> and after his decease it is subject to his debts.<sup>10</sup>

The mode of operation of a will of personalty is essentially different from the operation of a will of lands in this respect, that in strictness the appointment of an executor was formerly essential to a will of personalty;<sup>11</sup> and, at the present day, the usual and proper method is to appoint an executor as to the personal estate; whereas, under a devise of landed property, the lands pass at once to the devisee, and the intervention of an executor is quite unnecessary and inapplicable.<sup>12</sup> The executor of a will of personal estate becomes entitled, from the moment of the death of the testator, to all his personal property,<sup>13</sup> which after payment of the debts of the

<sup>1</sup> *Duffield v. Elwes*, 1 Sim. & Stu., 244.

<sup>2</sup> *Snellgrove v. Bailey*, 3 Atk., 214; and see *Boutts v. Ellis*, 4 De G., M. & G. 249; *Moore v. Darton*, 4 De G. & Sm., 517.

<sup>3</sup> *Witt v. Anis*, 1 B. & Sm. 109 (101 E. C. L.).

<sup>4</sup> *Veal v. Veal*, 27 Beav., 303; *Rankin v. Weguelin*, 27 Beav., 309. As to checks, see *Hewitt v. Kaye*, L. R., 6 Eq. 198, M. R.; *Bromley v. Brunton*, L. R., 6 Eq. 275, V.-C. S.

<sup>5</sup> *Wood v. Turner*, 2 Ves. Sr., 431; *Bryson v. Brownrigg*, 9 Ves., 1; *Bunn v. Markham*, 7 Taunt., 224 (2 E. C. L.); *Ruddell v. Dobree*, 10 Sim., 244; *Farquharson v. Cave*, 2 Coll., 356; *Powell v. Hellicar*, 26 Beav., 261.

<sup>6</sup> *Tate v. Hilbert*, 2 Ves. Jr., 111; 4 Bro. C. C., 286.

<sup>7</sup> *Edwards v. Jones*, 1 Myl. & Cr., 226; *Staniland v. Willott*, 3 Mac. & Gord., 664.

<sup>8</sup> *Blount v. Burrow*, 4 Bro. C. C., 72; *Hills v. Hills*, 8 M. & W., 401.

<sup>9</sup> 7 Taunt., 232 (2 E. C. L.).

<sup>10</sup> *Smith v. Casen*, mem. to *Drury v. Smith*, 1 P. Wms., 406; *Ward v. Turner*, 2 Ves. Sr., 434. See *ante*, pp. 74-75.

<sup>11</sup> *Wentworth's Executors* 3, 4, 14th ed.; 2 Black. Com., 503.

<sup>12</sup> In the goods of *Barden*, Law Rep., 1 P. & D., 325.

<sup>13</sup> Co. Litt., 388 a; Com Dig. tit. *Biens* (C); *Williams on Executors*, pt. 2, bk. 2.



deceased he is bound to apply according to the directions of the will. Thus, if the testator should specifically bequeath any part of his personal property, the property so bequeathed will not belong absolutely to the legatee until the executor has assented to the bequest; and this assent must not be given until the executor is satisfied that there is sufficient to pay the debts of the deceased without having recourse to the property so specifically given.<sup>1</sup>

If the testator should appoint as his sole executor an infant under the age of twenty-one years, such infant will not be allowed to exercise his office during his minority; but during this time the administration of the goods of the deceased will be granted to the guardian of the infant or to such other person as the court of probate may think fit. Such person is called an administrator *durante minore etate*.<sup>2</sup> If a married woman should be appointed an executrix, she cannot accept the office without the consent of her husband;<sup>3</sup> and, having accepted it with his consent, she is unable, without his concurrence, to perform any act of administration which may be to his prejudice; whilst he, on the other hand, may release debts due to the deceased or make an assignment of the deceased's personal estate, without his wife's concurrence;<sup>4</sup> for, as the general rule of law is that a husband and wife are but one person, the power, and with it the responsibility, are vested in the husband. Nevertheless, a married woman, being an executrix, may make a will without the consent of her husband, confined to the personal estate of which she is executrix;<sup>5</sup> and the executor of her will so made will be the executor of the original testator. For it is a general rule that, if an executor should die before having completely administered the estate of his testator, the executor appointed by the will of such executor will be entitled to complete the distribution of the estate of the former testator.<sup>6</sup>

In the United States, the varying statutes of the several States have very generally changed the foregoing rules respecting the

<sup>1</sup> Toller's Executors, bk. 3, s. 2; Williams on Executors, pt. 3, bk. 3, c. 4, s. 3.

<sup>2</sup> Williams on Executors, pt. 1, bk. 5, c. 3, s. 3; 3 Redf. on Wills, 104.

<sup>3</sup> *Ibid.*, pt. 1, bk. 3, c. 1.

<sup>4</sup> *Ibid.*, pt. 3, bk. 1, c. 4; Russel's Case, 5 Rep., 27 b.

<sup>5</sup> *Ibid.*, pt. 3, bk. 2, c. 1, s. 2.

<sup>6</sup> Bla. Com., 506. And it seems that he is bound to do so; Brooke v. Haymes, Law Rep., 6 Eq., 25, M. R.

executorship of married women, without sufficient uniformity in the enactment of others in their stead to constitute any which can be recognized as the American rules upon the subject. In some of the States, married women cannot act as executrices, and a *feme sole* terminates her authority so to act by contracting marriage; in others, a married woman may act as executrix if she were married at the time she was nominated as such, but not otherwise; in others, the English rule, that she may act with the consent of her husband, prevails, while, in still others, she may act independently of him.<sup>1</sup> And, in a majority of the States, the executor of an executor is not authorized to act as the executor of the original testator.

The testator, however, may, and usually does, appoint more than one person his executors. In this case the law regards all the co-executors as one individual person; and consequently any one of the executors of full age may, during the life of his companions, perform, without their concurrence, all the ordinary acts of administration, such as giving receipts, making payments, and selling and assigning the property.<sup>2</sup> But all the executors, infants included, must join in bringing actions respecting the estate.<sup>3</sup> If, therefore, the testator appoint a person indebted to him as his executor, or one of his executors, this appointment will operate at law as a release of the debt.<sup>4</sup> For the debt is a chose in action, and a man cannot either solely or conjointly with others bring an action against himself. In equity, however, an executor who was indebted to the testator is bound to account for his debt to the estate of the testator.<sup>5</sup> On the decease of any co-executor, the office survives to those who remain; and, if one of them should have renounced the executorship in the lifetime of his companions, he might at any time change his mind and undertake the office. But if, having survived all his companions, he should then renounce,<sup>6</sup> or if, without renunciation,

<sup>1</sup> Woerner's Am. Law of Administration, s. 232, references and citations.

<sup>2</sup> Shep. Touch., 484.

<sup>3</sup> Williams on Executors, pt. 2, bk. 1, c. 2. An ejectment was an exception, as any one executor might demise the entirety of the testator's leasehold land. Doe d. Stace v. Wheeler, 15 M. & W., 623.

<sup>4</sup> Wentworth's Executors, 73, 14th ed.; Freakley v. Fox, 9 B. & C., 130 (17 E. C. L.).

<sup>5</sup> Bnc. Ab. tit. Executors and Administrators (A), 10; Simmons v. Gutteridge, 13 Ves., 264.

<sup>6</sup> Hensloe's Case, 9 Rep., 36; Cresswick v. Woodhead, 4 M. & G., 811 (43 E. C. L.).

administration should be granted to another person,<sup>1</sup> he cannot afterwards interfere.

The rule that the appointment of a debtor as executor releases the debt does not obtain in the United States. In the absence of statutory regulation the debt, in such cases, is regarded as *prima facie* assets in the hands of the executor, and is to be accounted for as such.<sup>2</sup> By statute in a number of the States the rule has been carried to the other extreme, and such debts are treated as cash, for which the sureties on the executor's bond will be liable, if not accounted for, regardless of the solvency or insolvency of the executor at the time of his appointment;<sup>3</sup> though the power of the legislature to hold the sureties liable, under such circumstances, for worthless debts has not escaped question.<sup>4</sup>

If any person not duly authorized should intermeddle with the goods of the testator, or do any other act relating to the office of executor, he thereby becomes an executor of his own wrong, or, as it is called in law French, an executor *de son tort*. Such an executor is liable to the same demands from the creditors of the deceased as if he had been regularly appointed; but, like a regular executor, he is not liable beyond the amount of the assets of the testator which have come to his hands. The chief difference between such an executor and one who has been duly appointed is this, that an executor *de son tort* is not allowed to derive any benefit from his own wrongful intermeddling.

The most striking difference between a will of personal estate and a will of lands yet remains to be noticed. A will of lands has always operated and still operates as a mode of conveyance requiring no extrinsic sanction to render it available as a document of title. But a will of personal estate has always required to be proved; and probate of the will was required to be made in some

<sup>1</sup> *Venables v. East India Company*, 2 Ex. Rep., 633.

<sup>2</sup> *Woerner's Am. Law of Administration*, s. 311, citing *Griffith v. Chew*, 8 S. & R., 17, 33; *Tarbell v. Jewett*, 129 Mass., 457; *Griffin v. Bonham*, 9 Rich. Eq., 71; *Williams v. Morehouse*, 9. Conn., 470; *Mitchell v. Rice*, 6 J. J. Marsh., 623, 628; *Wright v. Lang*, 66 Ala., 389, 397; *Campbell v. Johnson*, 41 Ohio St., 588; *Roder v. Yeargin*, 85 Tenn., 486, etc.

<sup>3</sup> *Ibid.*, references and citations.

<sup>4</sup> *Ibid.*, citing *McCarthy v. Frazer*, 62 Mo., 263; *Baucus v. Barr*, 45 Hun, 582, affirmed in 107 N. Y., 624, and dissenting opinion in *Baucus v. Stover*, 89 N. Y., 6.

ecclesiastical court.<sup>1</sup> Before probate, however, the executor may perform all the ordinary acts of administration, such as receiving and giving receipts for debts due to the testator, paying the debts owing by the testator, and selling and assigning any part of the personal estate. But, when evidence is required of his right to intermeddle, the probate is the only valid proof; without it, therefore, no action or suit can be maintained, although proceedings may be commenced before, and carried up to the point where the evidence is required.<sup>2</sup>

The jurisdiction of the ecclesiastical courts over wills of personal estate is of a very ancient origin. The probate of wills of personalty, as a means of their authentication, appears to have been in use from the very earliest times. The first persons by whom probate was granted were said to be the lords of manors; and some vestiges of this ancient right long remained in the case of one or two manors, the lords of which retained such a jurisdiction until 1857. But so early as the time of Glanville, who wrote in the reign of Henry II., the ecclesiastical courts had acquired an exclusive right to determine on the validity of a will or the bequest of a legacy. And from this period the right of the church to interfere in testamentary matters became gradually settled, though not without much opposition on the part of the temporal lords.

A will was required to be proved in the court of the bishop or

<sup>1</sup> For the regulations adopted by the several States of the Union on the subject of the probate of wills, see the statutes of the respective States.—G. & W.

<sup>2</sup> Williams on Executors, pt. 1, bk. 4, c. 1, s. 2; *Stuart v. Burrowes*, 1 Drury, 265, 274.

In some of the States this power has been controlled by statute.

In Alabama, it has been decided that executors are not entitled to exercise any powers, as such, other than collecting and taking care of the estate, until they have given bond and taken the oath prescribed: *Cleveland et al., Executors, v. Chandler*, 3 Stew., 489; nor will their assent to a legacy, before probate, give any title to the legatee: *Gardner et al. v. Gault et al.*, 19 Ala., 666. In Vermont, an executor has no authority under a will until the same is approved or allowed by the judge of probate: *Tucker, Executor, v. Starkes et al.*, *Brayton*, 99. And see *Trask v. Donoghue*, 1 Aik., 370; *Thomas et al., Executors, v. Cameron*, 16 Wend., 579. But in New Hampshire it has been held that an executor derives his authority from the testator, and may commence an action, as such, before probate of the will: *Strong, Executrix, v. Perkins*, 3 N. H., 517; and see *Bowman's App.*, 62 Pa. St., 166.—G. & W.

<sup>3</sup> *Wentworth's Ex.*, 14th ed., 99, 100; *Toller's Executors*, 50.

<sup>4</sup> *Glanville*, lib. 7, c. 6, 7; 1 *Reeves's Hist. Eng. Law*, 72.

ordinary in whose diocese the testator dwelt, and within whose jurisdiction the personal effects of the testator consequently lay. But, if there were effects to the value of 5*l.*, called *bona notabilia*, in two distinct dioceses or jurisdictions within the same province, either of Canterbury or York, the will was required to be proved in the prerogative court of the archbishop of that province.<sup>1</sup> If there were personal effects within two provinces, the will must have been proved in each province, either in the prerogative court, or in some court of inferior jurisdiction; observing, as to each province, the same rule as would have applied had the testator had no property elsewhere.<sup>2</sup> If probate were granted by a bishop, or other inferior judge, in a case where the deceased had goods to the value of 5*l.* in any other diocese in the same province, such probate was absolutely void; but probate granted by an archbishop, in a case where the deceased had not *bona notabilia* in divers dioceses, was voidable only, and not absolutely void.<sup>3</sup>

When the will has been proved, it is the duty of the executor to pay the testator's debts out of the personal estate, to which the executor becomes entitled by virtue of his office. For this purpose the executor has reposed in him, by the law, the fullest powers of disposition over the personal estate of the deceased, whatever may be the manner in which it has been bequeathed by the will.<sup>4</sup> And, in the event of a sale of any such property by the executor, the purchaser is not bound to inquire whether there are any debts remaining unpaid; for, in the absence of evidence to the contrary, the executor is presumed to be acting in the proper discharge of his office.<sup>5</sup> Nor is the purchaser at all concerned with the application which the executor may make of the purchase-money; but the executor's receipt will be a sufficient discharge, and he alone will be responsible to the creditors and legatees for its due application.<sup>6</sup> The order in which debts ought to be paid out of the personal estate of a deceased debtor has been already noticed in the chapter on debts.<sup>7</sup>

<sup>1</sup> Williams on Executors, pt. 1, bk. 4, c. 2. For an account of the rise of the archbishop's jurisdiction, see Gent. Mag., new series, vol. 12, 582.

<sup>2</sup> Second Report of Real Property Commissioners, 67.

<sup>3</sup> Wentworth's Executors, 110, 14th ed.; *Lysons v. Barrow*, 2 Bing. N. C. 486 (29 E. C. L.).

<sup>4</sup> *Ewer v. Corbet*, 2 P. Wms., 148; *Russell v. Plaice*, 18 Beav., 21.

<sup>5</sup> *Nugent v. Gifford*, 1 Atk., 463; *Elliot v. Merriman*, 2 *Ibid.*, 42.

<sup>6</sup> *Wale v. Booth*, 4 Term Rep., 625, n.; *M'Leod v. Drummond*, 17 Ves., 154.

<sup>7</sup> *Ante*, pp. 139, 144, 145, 146.

When the debts have been paid, the legacies left by the testator are then to be discharged. In order to give the executor sufficient time to inform himself of the state of the assets and to pay the debts of the deceased, he is allowed a twelvemonth from the date of the death of the testator before he is bound to pay any legacies.<sup>1</sup> From this time, all such general legacies as remain unpaid carry interest.<sup>2</sup> Notwithstanding the lapse of a year from the testator's death, the executor, however, is still liable to any creditor of the deceased to the amount of the assets which have come to the executor's hands;<sup>3</sup> and, if he should have paid any legacies in ignorance of the claims of the creditor, his only remedy is to apply to the legatees to refund their legacies, which they will be bound to do, in order to satisfy the debt.<sup>4</sup> From this liability to creditors, an executor could not, until recently, have been discharged, unless he threw the property into chancery, in which case the court undertakes the administration, and the executor is consequently exonerated from all risk.<sup>5</sup> But statutes now prevail generally throughout America, as in England, under which executors and administrators, after giving notice by publication to creditors and others to present their claims within a prescribed period, may, after the expiration of that period, distribute the assets amongst the parties entitled, without liability to any person of whose claim they shall not have had notice at the time of distribution. The executor is, of course, not answerable to the testator's creditors beyond the amount of assets which have come to his hands,<sup>6</sup> unless he should, for sufficient consideration, give a written promise to pay personally,<sup>7</sup> or should do any act amounting to an admission that he has assets of the testator sufficient for the payment of the debts.<sup>8</sup>

A legacy may be either specific, demonstrative, or general. A specific legacy is a bequest of a specific part of the testator's personal estate. Thus a bequest of "the service of plate, which was

<sup>1</sup> Ward v. Penoyre, 13 Ves., 333; Benson v. Maude, 6 Madd., 15.

<sup>2</sup> Ward v. Penoyre, *ubi sup.*

<sup>3</sup> Norman v. Baldry, 6 Sim., 621; Knatchbull v. Fearnhead, 3 Myl. & Cr., 122; Hill v. Gomme, 1 Beav., 540

<sup>4</sup> March v. Russell, 3 Myl. & Cr., 31.

<sup>5</sup> Knatchbull v. Fearnhead, 3 Myl. & Cr., 126.

<sup>6</sup> Bac. Abr. tit., Executors; (P), 1.

<sup>7</sup> Stat. 29 Car., II., c. 3, s. 4; *ante*, p. 118; 1 Wms. Saund., 210, n. (1); 211, n. (2)

<sup>8</sup> Horsley v. Chaloner, 2 Ves., Sr., 83.

presented to me on such an occasion," is specific, and so also is a bequest of 100*l.* consols, now standing in my name at the Bank of England,<sup>1</sup> or of "100*l.* consols, part of my stock."<sup>2</sup> A specific legacy must be paid or retained by the executor in preference to those which are general; and must not be sold for the payment of debts until the general assets of the testator are exhausted.<sup>3</sup> It is, however, liable to *ademption* by the act of the testator in his lifetime. Thus, in the instances given above, if the testator should part with the plate, or sell the stock in his lifetime, the legacy will be adeemed, and the legatee will lose all benefit.<sup>4</sup> A demonstrative legacy is a gift by will of a certain sum directed to be paid out of a specific fund. Thus, "I bequeath to A. B. the sum of 50*l.* sterling, to be paid out of the sum of 100*l.* consols now standing in my name at the Bank of England," is a demonstrative legacy. Such a legacy is not liable to *ademption* by the act of the testator in his lifetime; for it is considered to be the testator's intention that the legatee should at all events have the legacy; but that it should, if possible, be paid out of the fund he has pointed out. If, therefore, the testator in this case should sell the 100*l.* consols in his lifetime, the 50*l.* will still be payable to the legatee out of the general assets.<sup>5</sup> A demonstrative legacy is accordingly more beneficial to the legatee than a specific legacy. And it is also more beneficial than a legacy which is merely general; for, being payable out of a specific fund, it is not, while that fund exists, liable to abatement with the general legacies.<sup>6</sup> A general legacy is one payable only out of the general assets of the testator, and is liable to abatement in case of a deficiency of such assets to pay the testator's debts and other legacies. A bequest to A. of 100*l.* sterling is a general legacy; so is a bequest of 100*l.* consols, without referring to any particular stock to which the testator may be entitled.<sup>7</sup> A bequest of a mourn-

<sup>1</sup> Roper on Legacies, c. 3; Gordon v. Duff, 28 Beav., 519.

<sup>2</sup> Kirby v. Potter, 4 Ves., 750 a.; Hayes v. Hayes, 1 Keen, 97; Shuttleworth v. Greaves, 4 Myl. & Cr., 35.

<sup>3</sup> Brown v. Allen, 1 Vern., 31; Hinton v. Pinke, 1 P. Wms., 539; Sleech v. Thorington, 2 Ves., Sr., 560.

<sup>4</sup> Ashburner v. M'Guire, 2 Bro., C. C., 108.

<sup>5</sup> Roberts v. Pocock, 4 Ves., 150; Attwater v. Attwater, 18 Beav., 330.

<sup>6</sup> Acton v. Acton, 1 Meriv., 178; Livesay v. Redfern, 2 You. & Col., 90.

<sup>7</sup> Wilson v. Brownsmith, 9 Ves., 180. See, however, Townsend v. Martin, 7 Hare, 471, *quere?*

ing ring, of the value of 10*l.*, is also a general legacy, no specific ring of the testator's being referred to.<sup>1</sup> In the two last cases, the executor would be bound to set apart or buy the stock, or purchase the ring for the legatee out of the general assets of the testator, supposing them sufficient for the purpose; and, should there be a deficiency, the amount of the stock, or the value of the ring to be purchased, would abate proportionably. If, however, any legacy should be given for a valuable consideration, it will not be liable to abatement with the other general legacies. An example of this exception to the usual rule occurs in the case of legacies given by husbands to their wives in consideration of their releasing their dower.<sup>2</sup>

When a legacy is bequeathed by a testator to his creditor, it is considered to be a satisfaction of the debt, if the legacy be equal to or greater than the amount of the debt.<sup>3</sup> But, if it be less than the debt,<sup>4</sup> or payable at a different time,<sup>5</sup> or of a different nature from the debt,<sup>6</sup> or if the debt be contracted subsequently to the date of the will,<sup>7</sup> or if the will contain an express direction for payment of debts and legacies,<sup>8</sup> the legacy will not be a satisfaction.<sup>9</sup> The leaning of the courts is against the doctrine of the satisfaction of debts by legacies, a doctrine which seems to have been established on rather questionable grounds. When, however, a sum of money is due to a child by

<sup>1</sup> 1 Roper on Legacies, c. 3, s. 2.

<sup>2</sup> Burridge v. Bradyl, 1 P. Wms., 127; Norcott v. Gordon, 14 Sim., 258.

<sup>3</sup> Fowler v. Fowler, 3 P. Wms., 353; Fourdrin v. Gowdey, 3 M. & K., 383, 409; 2 Roper on Legacies, c. 17, s. 1; Edmonds v. Low, 3 Kay & J., 318.

<sup>4</sup> Graham v. Graham, 1 Ves. Sr., 262.

<sup>5</sup> Nicholls v. Judson, 2 Atk., 300; Hales v. Darrell, 3 Beav., 324.

<sup>6</sup> Alleyn v. Alleyn, 2 Ves., Sr., 37; Bartlett v. Gillard, 3 Russ., 149; Fourdrin v. Gowdey, 3 Myl. & K., 383, 409.

<sup>7</sup> Cranmer's Case, 2 Salk., 508.

<sup>8</sup> Richardson v. Greese, 3 Atk., 65; Hassell v. Hawkins, 4 Drew., 468.

<sup>9</sup> Nor is a legacy by a creditor to his debtor, *prima facie*, a discharge or release of his debt; and the debt may be set off by the executor against the legacy: Strong's Exr. v. Bass *et al.*, 35 Pa. St., 333; but, if the will, or the declarations of the testator, before, at, or after the making of the will, show that such was his intention, the law, always, if possible, favoring the wishes of the decedent, will construe in accordance with that intention: Clark v. Bogardus, 12 Wend., 67; Ricketts v. Livingston, Exr., 2 Johns. Cas., 97; Sorelle's Exrs. v. Sorelle, 5 Ala., 245; Stagg v. Beekman, 2 Edw. Ch., 89; Zeigler *et al.*, Exrs., v. Eckhart, 6 Pa. St., 13; Lewis v. Thompson, 2 Richard. Eq., 75; Gallego v. Gallego's Exr., 2 Brockenb., 291.—G. & W.



way of portion, the inclination of the courts is against double portions; and a legacy to such a child is accordingly regarded as a satisfaction of the portion either in part or in whole, notwithstanding such legacy may be less than the portion, or payable at a different period.<sup>1</sup> A bequest of the residue, or of a share in the residue, of the testator's estate, will also be considered as a satisfaction *pro tanto*.<sup>2</sup> The presumption of satisfaction is indeed so strong that it is difficult to say what circumstances of variation between the portion and the legacy will be sufficient to entitle the child to both.

By a statute of George the Second, commonly called the Mortmain Act,<sup>3</sup> no hereditaments, nor any money, stock in the public funds, or other personal estate whatsoever to be laid out in the purchase of hereditaments, can be conveyed or settled for any charitable uses (with a few exceptions), otherwise than by deed, with certain formalities mentioned in the act.<sup>4</sup> And all gifts of hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect any hereditaments, or of any personal estate to be laid out in the purchase of any hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect the same, to or in trust for any charitable uses whatsoever, are rendered void if made in any other form than by the act as directed.<sup>5</sup> This has been very strictly construed, and has been held to prohibit the bequest for charitable purposes of personal estate in any degree savoring, as it is said, of the realty. Thus, it has been decided that money secured on mortgage of real estate,<sup>6</sup> shares in a canal navigation,<sup>7</sup> and leasehold estates,<sup>8</sup> cannot be left by will for any charitable purpose. But more recently the strictness of the courts appears to have relaxed; and it has lately been held that money secured by a policy of assurance, although

<sup>1</sup> *Hinchcliffe v. Hinchcliffe*, 3 Ves., 516; *Weall v. Rice*, 2 Russ. & My., 251.

<sup>2</sup> *Rickman v. Morgan*, 2 B. C. C., 394; *Earl of Glengall v. Barnard*, 1 Keen, 769; affirmed 2 H. of L. C., 131; *Beckton v. Barton*, 27 Beav., 99, 106; *Montefiore v. Guedalla*, 1 De G., F. & J., 94; *Coventry v. Chichester*, 2 H. & Mill., 149; s. c., 2 De G., J. & S., 336, reversed Law Rep., 2 H. of L., 71.

<sup>3</sup> Stat. 9. Geo. II., c. 36, s. 1.

<sup>4</sup> See *Williams' Real Property*, 55, 1st ed.; 58, 2d ed.; 60, 3d & 4th eds.; 63, 5th ed.; 65, 6th ed.; 67, 7th ed.; 66, 8th ed.

<sup>5</sup> S. 3.

<sup>6</sup> *Attorney-General v. Meyrick*, 2 Ves., Sr., 44.

<sup>7</sup> *House v. Chapman*, 4 Ves., 542. <sup>8</sup> *Attorney-General v. Graves, Amb.*, 155.

the company may invest their funds in real estates,<sup>1</sup> and shares in a banking company authorized to invest money on mortgage of real estates,<sup>2</sup> or in a mining company,<sup>3</sup> are not within the statute. So railway scrip,<sup>4</sup> and shares in gas companies,<sup>5</sup> docks, railways and canals,<sup>6</sup> although such shares may not be expressly declared by the acts establishing the undertakings to be personal estate, are now held to be unaffected by the statute. But debentures, by which such undertakings with their rates and tolls are mortgaged, have been held to be within the act;<sup>7</sup> though such debentures as are mere bonds or covenants to pay money, and not mortgages, are clearly unaffected by it.<sup>8</sup> With regard to the bequest of money to be laid out in the purchase of hereditaments, it has been decided that a bequest of money to be laid out in building on land already in mortmain is good;<sup>9</sup> but, if some land already in mortmain be not distinctly referred to, a bequest of money for building for any charitable purpose will be void, as implying a direction for the purchase of land on which to build.<sup>10</sup> And it has also been held that a gift is void which tends directly to bring fresh lands into mortmain, as a gift of money to a charity on condition that other persons provide the land.<sup>11</sup> This, however, has been overruled.<sup>12</sup> And, if the purchase of land be not involved in the gift, there is no law which prevents the bequest of purely personal property to any amount for charitable purposes. A bequest to a charity ought,

<sup>1</sup> *March v. Attorney-General*, 5 Beav., 433.

<sup>2</sup> *Ashton v. Lord Langdale*, 4 De G. & Sm., 402; s. c., 15 Jur., 868; *Myers v. Perigal*, 2 De G., M. & G., 599.

<sup>3</sup> *Hayter v. Tucker*, 4 Kay & J., 242. See *Morris v. Glynn*, 27 Beav., 218.

<sup>4</sup> *Ashton v. Lord Langdale*, *ubi supra*.

<sup>5</sup> *Thompson v. Thompson*, 1 Coll., 381; *Sparling v. Parker*, 9 Beav., 450.

<sup>6</sup> *Hilton v. Giraud*, 1 De G. & Sm., 183; *Sparling v. Parker*, *ubi supra*; *Walker v. Milne*, 11 Beav., 507; *Ashton v. Lord Langdale*, *ubi supra*; *Edwards v. Hall*, 6 De G., M. & G., 74; *Linley v. Taylor*, 1 Giff., 67; affirmed, 2 De G., F. & J., 84.

<sup>7</sup> *Ashton v. Lord Langdale*, *ubi supra*; *Re Langham's Trust*, 10 Hare, 446.

<sup>8</sup> *Ashton v. Lord Langdale*, *ubi supra*.

<sup>9</sup> *Glubb v. Attorney-General*, Amb., 373.

<sup>10</sup> *Pritchard v. Arbouin*, 3 Russ., 456; *Smith v. Oliver*, 11 Beav., 481; *In re Watmough's Trusts*, V.-C. M., Law Rep., 8 Eq., 272.

<sup>11</sup> *Attorney-General v. Davies*, 9 Ves., 535; *Mather v. Scott*, 2 Keen, 172; *Tyre v. Corporation of Gloucester*, 14 Beav., 173.

<sup>12</sup> *Philpot v. St. George's Hospital*, 6 H. of L. C., 338.

therefore, to be directed to be paid out of such part of the testator's personal estate as he may lawfully bequeath for such a purpose. For, if this precaution should be neglected, the charitable legacies will fail in the proportion which the personal assets savoring of the realty may bear to those which are purely personal.<sup>1</sup> In the United States, devises and bequests to charitable and religious uses are the subject of statutory regulations in the several States.

Other bequests which require some care are those to illegitimate children. It has been held that a bequest to the future illegitimate children of a particular woman is void as tending to encourage immorality.<sup>2</sup> And it is clear that a bequest to the future illegitimate children of a particular man is also void, as the courts cannot enter into the inquiry which would be necessary to identify such children.<sup>3</sup> A child *prima facie* means a legitimate child; a bastard is considered by the law as *nullius filius*. Accordingly, an illegitimate child can never take under a gift to children, unless it be clear, upon the terms of the will, or according to the state of facts at the making of it, that legitimate children never could have taken.<sup>4</sup> An illegitimate child may, however, take under any gift in which he is sufficiently identified as the object of the testator's bounty. Thus, a bequest to the child of which a woman is now pregnant is good.<sup>5</sup> And, if illegitimate children have acquired the reputation of being the children of the testator or any other person, and it appear by necessary implication on the face of the will that such persons were intended in a bequest to children, they will be entitled, not only on account of their being children, but on account of their reputation as such.<sup>6</sup>

After payment of the testator's debts and legacies, the residue

<sup>1</sup> Attorney-General v. Tyndall, 2 Eden, 207; s. c., 2 Amb., 614; Hobson v. Blackburn, 1 Keen, 273; Philanthropic Society v. Kemp, 4 Beav., 581; and see Robinson v. Geldard, 3 Macn. & G., 735; Tempest v. Tempest, 7 De G., M. & G., 470; Beaumont v. Oliveira, LL. J., Law Rep., 4 Chan., 309.

<sup>2</sup> Medworth v. Pope, 27 Beav., 71. See also 2 Jarman on Wills, 153, 202, 2d ed.; 204 3d ed.

<sup>3</sup> Wilkinson v. Adams, 1 Ves. & B., 466.

<sup>4</sup> Cartright v. Vawdry, 5 Ves., 530; Godfrey v. Davis, 6 Ves., 43; Harris v. Lloyd, 1 T. & Russ., 310; Bagley v. Mollard, 1 Russ. & My., 581; Dover v. Alexander, 2 Hare, 275; *Re Overhill's Trust*, 1 Sm. & G., 362.

<sup>5</sup> Gordon v. Gordan, 1 Meriv., 141.

<sup>6</sup> Wilkinson v. Adam, 1 Ves. & B., 422; Gill v. Shelly, 2 Russ. & My., 336; Meredith v. Farr, 2 You. & Col., 525.

of his personal estate must be paid over to the residuary legatee, if any, named in the will. A will of personal estate is always considered as speaking from the death of the testator and takes effect as if it had been executed immediately before such death, unless a contrary intention shall appear by the will. Hence, it follows that all personal property acquired by the testator between the time of making his will and his decease will pass under it. If any legacy should lapse by the death of the legatee in the testator's lifetime, or should fail from being contrary to law, it will fall into the residue, and belong to the residuary legatee. And a legacy will lapse by the death of the legatee in the testator's lifetime, although given to the legatee, his executors, administrators and assigns;<sup>1</sup> for these words are merely inserted in analogy to the limitation of real estate to a man and his heirs. If a bequest be made to two or more as joint tenants, and one of them die in the lifetime of the testator, his share will not lapse, but will survive to the others.<sup>2</sup> But, if the bequest be to two or more in common, and one of them die in the testator's lifetime, his share will lapse;<sup>3</sup> unless the bequest be made to a class, as to the children of A. in equal shares, in which case all who answer that description at the testator's decease,<sup>4</sup> and also (if the period of distribution be postponed by the will) all who come into being before such period,<sup>5</sup> will be entitled to divide the bequest amongst them. Statutes now provide in England and in many of the United States that legacies shall not lapse upon the death of the legatee in the life-time of the testator, but shall pass to the representatives of the former, unless a contrary intent appear in the will.

If there were no residuary legatee, the residue of the testator's personal estate, after payment of debts and legacies, formerly belonged to the executor for his own benefit, unless a contrary intention appeared from his being left executor in trust,<sup>6</sup> or from

<sup>1</sup> *Elliott v. Davenport*, 1 P. Wms., 83.

<sup>2</sup> *Morley v. Bird*, 3 Ves., 628, 631.

<sup>3</sup> *Bagwell v. Dry*, 1 P. Wms., 700; *Page v. Page*, 2 P. Wms., 489; *Barber v. Barber*, 3 Myl. & Cr., 688; *Bain v. Leacher*, 11 Sim., 397.

<sup>4</sup> *Viner v. Francis*, 2 Cox, 190; 2 Jarm. Wills, 74; 126, 2d ed.; 142, 3d ed.; *Lee v. Pain*, 4 Hare, 250.

<sup>5</sup> *Ayton v. Ayton*, 1 Cox, 327; 2 Jarm. Wills, 75; 127, 2d ed.; 143 3d ed.

<sup>6</sup> *Pring v. Pring*, 2 Vern., 99; *Bagwell v. Dry*, 1 P. Wms., 700.

his having a legacy left him for his trouble,<sup>1</sup> or from other circumstances.<sup>2</sup> Now, such residue must be accounted for to the person or persons who would be entitled to the estate under the Statute of Distributions if the testator had died intestate, unless it shall appear by the will or any codicil thereto<sup>3</sup> that the person so appointed executor was intended to take such residue beneficially. The Statute of Distributions is that under which the personal estate of any one dying intestate is distributed between his widow and next of kin. An account of this statute will be found in the next chapter.

<sup>1</sup> *Rachfield v. Careless*, 2 P. Wms., 158.

<sup>2</sup> *Mullen v. Bowman*, 1 Coll., 197.

<sup>3</sup> *Love v. Gaze*, 8 Beav., 472.

## CHAPTER IV.

### OF INTESTACY.

THE ecclesiastical courts until recently had jurisdiction not only over the wills of testators, but also over the goods of persons dying intestate. This jurisdiction, though of long standing, appears to have been at first gradually acquired. In early times, the clergy, being possessed of almost all the learning, appear to have been the principal framers of wills. The power they thus acquired was exercised for their own benefit, every man being expected, on making his will, after bequeathing to his lord his heriot, in the next place to remember the church.<sup>1</sup> If, however, a man should have died intestate, without opportunity of making this provision, the distribution of his goods devolved on the church, together with his friends, the lord having first taken his heriot.<sup>2</sup> The wife and the children were entitled to their shares; and that part of the goods which the intestate had power to dispose of by his will (called the portion of the deceased) was applied by the church *in pios usus*. This application to pious uses appears to have been as follows: In the first place, the bequest, which it was to be presumed the intestate would have made to the church, was retained, and the residue was then disposed of in paying the debts of the deceased, and distributed amongst his wife and children, his parents and their relatives. That this was the case appears from the complaints which were made by the clergy of those days, of the interference of the temporal lords in cases of intestacy, whereby the distribution of the effects in the manner pointed out was prevented.<sup>3</sup> The clergy themselves, however, do not appear to have been always free from blame; for they

<sup>1</sup> Glanville, lib. 7, c. 5; Bract., 60 a; Fleta, lib. 2, c. 57.

<sup>2</sup> Bract. 60 b.; Fleta, *ubi supra*.

<sup>3</sup> Matthew Paris, 951, Additamenta, 201, 204, 209 (Wats' ed., London, 1640); Constitutions of Boniface, Constitutiones Provinciales, 20, at the end of Myndewood's Provinciale (Oxon., 1679), recited also in a Constitution of Archbishop Stratford (Lynd. Prov., lib. 3, tit. 13). See Gent. Mag., New Series, vol. ii, 355, 474. See also Dyke v. Walford, Privy Council, 12 Jurist, 839.

are accused of having frequently taken the whole of the intestate's portion to themselves, making no distribution, or at least an undue one, amongst the creditors and relatives of the deceased;<sup>1</sup> and, in order to remedy this evil, it was enacted in the reign of Edward I., by one of the very few statutes then passed relating to personal estate,<sup>2</sup> that the ordinary should be bound to answer the debts of an intestate, so far as his goods would extend, in the same manner as the executors would have been bounden if he had made a testament. The right of the creditor was thus clothed with a remedy; for, under this statute, an action at law might be brought by the creditor against the ordinary for the payment of his debt;<sup>3</sup> but the right of the relatives to the surplus still remained undefined.

The duty of administering intestates' effects was not, as may be supposed, usually performed by the bishops in person. For this purpose they usually appointed an administrator; but, as personal property rose in importance, it became desirable that this administrator should not be considered as the mere agent of the bishop, but should himself have a *locus standi* in the king's courts. It was accordingly enacted, by a statute of the reign of Edward III.,<sup>4</sup> that where a man died intestate the ordinaries should depute the next and most lawful friends of the deceased to administer his goods, which persons so deputed should have action to demand and recover as executors the debts due to the deceased, to administer and dispend for the soul of the dead; and should answer also, in the king's courts, to others to whom the deceased was holden and bound, in the same manner as executors should answer. By a subsequent statute,<sup>5</sup> administration might be granted to the widow of the deceased, or to the next of his kin, or to both, as by the discretion of the ordinary should be thought good. The widow was usually preferred to the next of kin in the grant of administration;<sup>6</sup> and a joint grant was seldom made, so seldom, indeed, that the powers of co-administrators appear to be still a matter of doubt.<sup>7</sup> In granting administration to the next of kin, the ecclesiastical courts were guided by the right to the property to be adminis-

<sup>1</sup> Fleta, lib. 2, c. 57.

<sup>2</sup> Stat. 13, Edw. I., c. 19.

<sup>3</sup> 1 Ro. Abr., 906; Bac. Abr., tit. Executors and Administrators (E.).

<sup>4</sup> 31 Edw. III., c. 11.

<sup>5</sup> 21 Hen. VIII., c. 5.

<sup>6</sup> Webb v. Needham, 1 Adams, 494.

<sup>7</sup> Shep. Touch. 485, 486; Williams on Executors, pt. 3, bk. 1, c. 2.

tered.<sup>1</sup> This right will be hereafter explained. If none of the next of kin would take out administration, a creditor might by custom do so, on the ground that he could not be paid his debt until representation were made to the deceased;<sup>2</sup> and, for want of creditors, administration might be granted to any person at the discretion of the court.<sup>3</sup>

The jurisdiction over the estates of deceased persons, whether testate or intestate, is now exercised, both in England and America, by probate courts, created by statute; and the persons respectively entitled to letters of administration upon the estates of intestates are also now designated by statute.

The administrator, when appointed, has the same right to and power over all the personal estate of the intestate as his executors would have had if he had made a will;<sup>4</sup> and this right and power relate back to the time of the intestate's decease.<sup>5</sup> The same duty also devolves upon the administrator of paying the debts in the first place. The provisions of the recent statutes for protection of executors in distributing the assets of their testator extend also to the administrator of the effects of an intestate.<sup>6</sup> The surplus, after payment of the debts, must be distributed among the relatives of the intestate in proportions to be hereafter mentioned. In order to enable the administrator to inform himself of the state of the assets, and to pay the debts of the deceased, the same period of a year from the time of the decease as is allowed to an executor is also given to the administrator before he can be required to make any distribution.<sup>7</sup> But, notwithstanding this delay, the interest of the persons entitled to the surplus vests in them from the time of the decease of the intestate; so that, in case any of them should die within a twelve-month after the decease of the intestate, the share of the person so dying will pass to his own executors or administrators.<sup>8</sup>

<sup>1</sup> In the Goods of Gill, 1 Hagg., 342.

<sup>2</sup> Webb v. Needham, 1 Adams., 494. See Coombs v. Coombs, Law Rep., 1 P. & D., 288.

<sup>3</sup> Williams on Executors, pt. 1, bk. 5, c. 2, s. 1.

<sup>4</sup> Williams on Executors, pt. 2, bk. 1, c. 1.

<sup>5</sup> Tharpe v. Stallwood, 5 M. & G., 760 (44 E. C. L.); Foster v. Bates, 12 M. & W., 226; Welchman v. Sturgis, 13 Q. B., 552 (66 E. C. L.).

<sup>6</sup> Ante, p. 323.

<sup>7</sup> Stat. 22 & 23 Car. II., c. 10, s. 8.

<sup>8</sup> Edwards v. Freeman, 2 P. Wms., 442.



In some instances, administration is granted for a limited purpose, or confined to a given time. Of this we have already had an instance in the case of administration *durante minore etate*, when the sole executor named in a will is under age;<sup>1</sup> and the same sort of administration is granted on intestacy, in case of the minority of the next of kin.<sup>2</sup> So, if the executor or next of kin, as the case may be, should be out of the realm at the time of the decease of the testator or intestate, the court will grant a limited administration *durante absentia*, which will expire the moment of the return of such executor or next of kin. So, if a will should have been made, but the executors should have renounced or died before their testator, the court will appoint the person having the greatest interest in the effects, generally the residuary legatee, to administer the same according to the directions of the will, in which case the administration granted is termed an administration *cum testamento annesso*, with the will annexed.<sup>3</sup>

The office of administrator is not transmissible, like the office of executor. On the decease of an administrator before he has distributed all the effects of the intestate, a new administrator must be appointed; for the administrator or executor of such administrator has no right to intermeddle. So, if an executor should die intestate, without having completely distributed his testator's effects, an administrator must be appointed to distribute, according to the will of the testator, such of his effects as were not distributed by the deceased executor.<sup>4</sup> In each of these cases the administration granted is called an administration *de bonis non administratis*, of the goods not administered, or, more shortly, *de bonis non*.<sup>5</sup>

The application of an intestate's effects, after payment of his debts, is now regulated by statutes of the reign of Charles II. and James II.,<sup>6</sup> commonly called the Statutes of Distribution, by which statutes the rights of the relations of the deceased appear to have been first definitely ascertained and rendered legally available.

<sup>1</sup> *Ante*, p. 318.

<sup>2</sup> Williams on Executors, pt. 1, bk. 5, c. 3, s. 3.

<sup>3</sup> Williams on Executors, pt. 1, bk. 5, c. 3, s. 1.

<sup>4</sup> Shep. Touch., 465; Williams on Executors, pt. 1, bk. 3, c. 4.

<sup>5</sup> Williams on Executors, pt. 1, bk. 5, c. 3, s. 2.

<sup>6</sup> 22 & 23 Car. II., c. 10; 1 Jac. II., c. 17, s. 7. See Watkins on Descents, Appendix, 257 *et seq.*, 4th ed.

<sup>7</sup> Each State of the Union has its own Statute of Distributions; and these,

Under these statutes, if the intestate leave a widow and any child or children, or descendant of any child, the widow shall take a third part of the surplus of his effects. If he leave no child, nor descendant of any child, she shall have a moiety. In this respect the distribution is the same as took place under the ancient law. The husband of a married woman is entitled to the whole of her effects.<sup>1</sup> If the intestate leave children, two-thirds of his effects, if he leave a widow, or the whole, if he leave no widow, shall be equally divided amongst his children, or, if but one, to such one child. But the descendants of such children as may have died in the intestate's lifetime shall stand in the place of their parent or ancestor.<sup>2</sup> Such children, however, as have been advanced by the parent in his lifetime must bring the amount of their advancement into hotchpot, so as to make the estate of all the children to be equal, as nearly as can be estimated. But the heir-at-law, notwithstanding any lands he may have by descent or otherwise from the intestate, is to have an equal part in the distribution with the rest of the children, without any consideration of the value of such land.<sup>3</sup> If the intestate leave no children or representatives of them, his father, if living, takes the whole; or, if the intestate should have left a widow, one-half. If the father be dead, the mother, brothers and sisters of the intestate shall take in equal shares,<sup>4</sup> subject, as before, to the widow's right to a moiety; and brothers or sisters of the half blood have an equal claim with those of the whole blood.<sup>5</sup> If any brother or sister shall have died in the lifetime of the intestate, leaving children, such children shall stand *in loco parentis*, provided the mother or any brother or sister be living.<sup>6</sup> If there be no brother or sister, nor child of such brother or sister, the mother shall take the whole; or, if the widow be living, a moiety only, as before; but a stepmother can take nothing.<sup>7</sup> If there be no mother, the brothers and sisters take equally, the children of

slightly differing from each other, are but modifications of the Statutes of Charles II., and James II.—G. & W.

<sup>1</sup> Stat. 29 Car. II., c. 3, s. 25.

<sup>2</sup> See Burton's Compendium, pl. 1402.

<sup>3</sup> Stat. 22 & 23 Car. II., c. 10, s. 5; *Boyd v. Boyd*, V.-C. W., Law Rep., 4 Eq. 302.

<sup>4</sup> Stat. 1 Jac. II., c. 17, s. 7.

<sup>5</sup> *Jessopp v. Watson*, 1 Myl. & K. 665; *Burnet v. Mann*, 1 Myl. & K., 672, n.

<sup>6</sup> *Lloyd v. Tench*, 2 Ves., Sr., 215; *Durant v. Prestwood*, 1 Atk., 454; West, 448.

<sup>7</sup> *Duke of Rutland v. Duchess of Rutland*, 2 P. Wms., 216.

such as may be dead standing *in loco parentis*. Beyond brothers' and sisters' children no right of representation belongs to the children of relatives with respect to the shares which their deceased parents would have taken. And, if there be neither brother, sister or mother of the intestate living, his personal estate will be distributed in equal shares amongst those who are next in degree of kindred to him.

In tracing the degrees of kindred in the distribution of an intestate's personal estate, no preference is given to males over females, nor to the paternal over the maternal line,<sup>1</sup> nor to the whole over the half blood, as in the case of descent of real estate; nor does the issue stand in the place of the ancestor. The degrees of kindred are reckoned according to the civil law, both upwards to the ancestor and downwards to the issue, each generation counting for a degree.<sup>2</sup> Thus, from father to son, or from son to father, is one degree; from grandfather to grandson, or from grandson to grandfather, is two degrees; and from brother to brother is also two degrees, namely, one upwards to the father and one downwards to the other son. So, from uncle to nephew is three degrees, one upwards to the common ancestor and two downwards from him; and from nephew to uncle is also three degrees, two upwards and one downwards. If, therefore, there be neither issue nor father, brother, sister or mother of the intestate living, such persons as are his next of kin, according to the rule above laid down, are entitled in equal shares *per capita* to his personal estate, subject to his wife's right to a moiety should she survive him. As the kindred becomes more distant, the number of persons entitled, if living, as well as the difficulty of proving their respective pedigrees, become prodigiously augmented. "It is at the first view astonishing," says Blackstone,<sup>3</sup> "to consider the number of lineal ancestors which every man has within no very great number of degrees; and so many different bloods is a man said to contain in his veins as he hath lineal ancestors. Of these he hath two in the first ascending degree, his own parents; he hath four in the second, the parents of his father and the parents of his mother; he hath eight in the third, the pa-

<sup>1</sup> *Moor v. Barham*, 1 P. Wms., 53.

<sup>2</sup> *Mentney v. Petty*, Pre. Cha., 593; *Wallis v. Hodson*, 2 Atk., 117; 2 Black. Com., 504, 515.

<sup>3</sup> 2 Black. Com., 203.

rents of his two grandfathers, and two grandmothers; and by the same rule of progression he hath an hundred and twenty-eight in the seventh; a thousand and twenty-four in the tenth; and at the twentieth degree, or the distance of twenty generations, every man hath above a million of ancestors, as common arithmetic will demonstrate." The number of collateral relations who may claim through such ancestors is of course far more numerous.

If there be no next of kin, the crown, by virtue of its prerogative, will stand in their place,<sup>1</sup> but subject always to the widow's right to a moiety in case she should survive.<sup>2</sup>

The division of the personal estate of an intestate, effected by the Statute of Distributions, is remarkable for its fairness. The only provision which might be amended is that which places the half blood on an equality with the whole. A corresponding equality in interest and feeling but rarely exists in actual life. The appointment of an executor or administrator, in whom the whole personal property is vested, with full power of disposition, tends greatly to simplify the title to leasehold estates and other property of a personal nature. It could be wished, however, that the office of an administrator were transmissible in the same manner as that of an executor. In other respects, the distribution of personal estate on intestacy approaches far more nearly to the disposition which the deceased himself would probably have made, than the descent of real property, either at the common law or according to the custom of gavelkind. A person possessed only of small landed property usually devises it to trustees for sale, with full power to give receipts to purchasers, and directs the division of the produce by his trustees amongst his children in such shares as he may think just, with regard to the provision already made for any of them in his lifetime. He does not leave his younger children to beggary in order that his whole property may devolve to his eldest son, according to the course of the common law, a course pursued, as the author believes, in no other civilized country in the world.<sup>3</sup> Neither does he leave it to all his sons equally in undivided shares, thus inflicting an injustice on his daughters, and allowing all plans for the improvement of the lands to be checked by one dissentient

<sup>1</sup> *Taylor v. Haygarth*, 14 Sim., 8; *Powell v. Merrett*, 1 Sm. & Giff., 381. See-stat. 15 & 16, Vic., c. 3.

<sup>2</sup> *Cave v. Roberts*, 8 Sim., 214.

<sup>3</sup> *Co. Litt.*, 191, a, n. (1), vi., 4.

voice, unless a partition should be resorted to, by which the property would be split up into parcels too small for the convenience of agriculture. If, by any accident, a man should die without making his will, it would seem to be the province of an equitable legislature to make such a disposition of his property as would, in ordinary circumstances, most nearly correspond with his intention. It is true, that when property is large, it is usually entailed on the eldest son and his issue, subject to moderate portions for the younger children. This custom of primogeniture is suited to the institutions of our country and to the habits of the class to which large landed property usually belongs, and the author has no wish to see it disturbed. The settlements, however, by which these entails are created are more frequently made by deed than by will. They almost invariably contain provisions for the portions of younger children, varying in amount with the value of the property; and, whether made by deed or will, they are usually long and intricate in their nature, providing for the numerous contingencies which may arise under the peculiar circumstances of each family. Nothing, in fact, can be more different than the devolution of an estate to the eldest son under a family settlement, and the descent on an intestacy to the eldest son as heir-at-law. In the one case, he takes subject to the proper claims of the other members of his family; in the other, he is bound to them by no obligation at all. There seems to be no method of making, in case of intestacy, any sort of disposition of landed property which might be reasonably simple and at the same time resemble an ordinary family settlement. If such a settlement be not made by deed, the owner has ample power of effecting the same object by his will. Intestacy, in fact, rarely happens to the owner of large landed property. The property which descends to heirs under intestacies, though large in the aggregate, is generally small in individual cases. When the wishes of all cannot be consulted, that which would have been the wish of the generality of intestates ought, apparently, to form the foundation of the rule. From a consideration of these circumstances, the reader may, perhaps, be induced to think that if, in case of intestacy, the rules for the devolution of real and personal estate were identical and, with some slight variations, similar to those which now exist as to personalty, the law on this subject would be rendered both more simple and more just.

The descent of real estate to distant heirs, and the devolution of personalty to distant kindred, involve an amount of learning and litigation the abolition of which would perhaps be desirable. The family and near relations of an intestate have generally claims upon his bounty, which ought not to be disappointed by the accident of his decease without making a will. But distant relatives have seldom any such claims, nor consequently any expectation of such claims being fulfilled. To withhold from them, therefore, that which they had never expected to enjoy, would not be to inflict a loss. Under the present system, the property of an intestate who has no near relations is not unfrequently frittered away in expensive contests between opposing claimants, or else it devolves unexpectedly upon persons who, for want of previous education, are unable to make use of it with benefit either to themselves or to the community. In a country so heavily burdened as our own, any addition to the public income, not having the pressure of a tax, would be a very desirable acquisition. Such an addition might, as it appears to the author, be very properly made by the devolution to the public of the properties of intestates having none but distant relatives. The country in which a man has lived, and in which his property has been acquired, or at any rate protected, has certainly some claims upon him—claims which seem preferable to those of a man who, in the case of real estate, founds his title on his descent from the *most remote* male paternal ancestor of the intestate;<sup>1</sup> or who claims a share in the personalty because he chances to be a survivor amongst the multitude standing in the fifth or sixth degree of a series of kindred which increases, as it grows distant, in geometrical progression.<sup>2</sup>

<sup>1</sup> See Williams' Real Property, 78, 1st ed.; 83, 2d ed.; 87, 3d and 4th eds.; 92 5th ed.; 98, 6th ed.; 101, 7th ed.; 104, 8th ed.; 6th Am. ed., 77-78.

<sup>2</sup> The author's attention has since been called to a similar proposal in Mill's Political Economy, vol. 1, 272, 273, 2d ed.

## CHAPTER V.

### OF THE MUTUAL RIGHTS OF HUSBAND AND WIFE.

MARRIAGE, being essential to the welfare of the community and involving also important consequences to the individuals concerned, is not on the one hand allowed to be unduly restrained, nor on the other to be brought about by unfair means.

Amongst the many striking differences between the laws of real and personal property, by which our legal system is complicated, will be found the rules relating to attempted restraints on marriage. Real estate is governed by the rules of common law; but personal estate, when bequeathed by will, has, as we have seen,<sup>1</sup> long been subject to the jurisdiction of the ecclesiastical courts. These courts have adopted, with some modification, the rules of the civil law, which is more favorable than the common law of England to liberty of choice in marriage. Hence it follows that some restrictions on marriage, which are valid when applied to a gift of real estate, are void when attempted to be imposed on a gift of personal property. The rules respecting real and personal estate so far agree that a condition annexed to a gift of either, that a person shall not marry at all, is void.<sup>2</sup> But a gift of either by a husband to his wife during her widowhood is valid;<sup>3</sup> neither would a gift of the income of property to a single person until marriage, with a gift over on marriage, appear to be invalid.<sup>4</sup> When, however, a gift is made, with a condition that it shall be forfeited if the donee marry without the consent of certain trustees or other persons, the difference between the laws of real and personal estate becomes conspicuous.

<sup>1</sup> *Ante*, p. 321.

<sup>2</sup> *Shep. Touch.*, 132; *Perrin v. Lyon*, 9 East, 170, 183; *Rishton v. Cobb*, 9 Sim., 615; 5 Myl. & Cr., 145; *Morley v. Rennoldson*, 2 Hare, 570.

<sup>3</sup> *Barton v. Barton*, 2 Vern., 308.

<sup>4</sup> See *Right d. Compton v. Compton*, 9 East, 267; *Morley v. Rennoldson*, 2 Hare, 570, 580; *Webb v. Grace*, 3 Phil., 701; *Lloyd v. Lloyd*, 2 Sim., N. S., 255; *Heath v. Lewis*, 3 De G., M. & G., 954; *Evans v. Prosser*, V.-C. W.; 10 Jur. N. S., 385.

If the gift be of real estate, or of money charged on real estate, it will cease on the event of marriage without the required consent.<sup>1</sup> But, if it be a bequest of personal property, the condition is regarded as merely *in terrorem* and void,<sup>2</sup> unless accompanied by a bequest over to some other person on the marriage taking place without consent;<sup>3</sup> so that the legatee will be entitled to retain the legacy, notwithstanding his or her marriage without consent, unless on that event it be expressly given in some other manner. Such conditions in bequests of personalty, when unaccompanied by a gift over, are called *in terrorem*, because, says Lord Eldon, "they are supposed to alarm persons, when we know they contain no terror whatsoever."<sup>4</sup>

In order to prevent marriages from being unfairly obtained, it is a rule in equity that all contracts for reward for procuring marriages (called marriage brokerage) are void.<sup>5</sup> And, if a parent or guardian should stipulate for any private benefit for the marriage of his child or ward, such stipulation would be void, and money actually paid under it would be decreed to be refunded.<sup>6</sup>

Few marriages are now contracted between persons possessing any amount of property, without a previous settlement of such property being made, in some stipulated manner, for the benefit of the intended husband and wife and the children of the marriage. As marriage is a valuable consideration,<sup>7</sup> such settlements are binding on both parties if of full age. But, if either husband or wife should be under age, the settlement will not be binding on him or her,<sup>8</sup> although the other party, if of full age, will be bound by it.<sup>9</sup> And, if both of them should be under age, neither of them will be bound by it. The circumstance of the settlement of an infant's personal property being fair and reasonable, and made with approbation of his or her guardians, was formerly considered as giving it validity;<sup>10</sup> but this circumstance seems now to have no weight.

<sup>1</sup> *Reynish v. Martin*, 3 Atk., 330, 333.

<sup>2</sup> *Bellasis v. Ermine*, 1 Cha. Ca., 22.

<sup>3</sup> *Stratton v. Grymes*, 2 Vern., 357; *Harvey v. Aston*, 1 Atk., 361; *Clarke v. Parker*, 19 Ves., 1, 13. <sup>4</sup> 19 Ves., 13.

<sup>5</sup> *Hall v. Potter*, 3 Levinz, 411; *Shower's Par. Cas.*, 76.

<sup>6</sup> *Fonblanque on Equity*, 262; *Smith v. Bruning*, 2 Vern., 392.

<sup>7</sup> *Ante*, p. 116.

<sup>8</sup> *Ellison v. Elwin*, 13 Sim., 309; *Le Vasseur v. Scrutton*, 14 Sim., 116.

<sup>9</sup> *Durnford v. Lane*, 1 Bro. C. C., 106; *Milner v. Lord Harewood*, 18 Ves., 259.

<sup>10</sup> 2 *Roper's Husband and Wife*, 26.



It has, however, been decided that a competent legal jointure<sup>1</sup> settled on the intended wife, then an infant, with the concurrence of her guardians, in lieu of her right to dower out of her husband's freehold lands, and in lieu of her distributive share of his personal estate in the event of his intestacy, was sufficient to deprive her both of her dower and of her distributive share in her husband's personalty.<sup>2</sup> When the intended wife only is an infant, a settlement of her personal estate in possession is valid, on account of the interest which, as we shall see, the law gives to the husband in such personal estate. The settlement in such a case is in fact made not by the wife, but by her husband, who, being adult, is bound by its provisions to the extent of the interest which he would have taken had no settlement been made.<sup>3</sup>

If no settlement be made, the principles which govern the rights of husband and wife to personal property must still be traced to the circumstances of ancient rather than of modern times. In ancient times landed property was by far the most important; and the wife was accordingly entitled to a provision out of the lands of her husband, in the event of her surviving him, which no alienation that he could make, nor any debts which he might incur, were able to set aside.<sup>4</sup> But in those days personal property was of too insignificant a value to be the subject of any such provision. And, if a woman now marry without a settlement, she has still no claim on her husband's personal estate, however large, unless he should happen to die intestate, in which case, as we have already mentioned, she is entitled to a third or a half of what he may leave, according as he may or may not leave issue surviving him. A husband, on the other hand, was in ancient times considered absolutely entitled to such personal chattels as his wife might possess. In this respect the law was then both simple and sufficient. By the act of marriage, the wife placed herself under the coverture or protection of her husband. She became in the law French of those days a *feme covert*. Thenceforth all demands to which she was personally liable

<sup>1</sup> See Williams' Real Property, 174, 1st ed.; 184, 2d ed.; 191, 3d ed.; 192, 4th ed.; 201, 5th ed.; 211, 6th ed.; 216, 7th ed.; 225, 8th ed.; 6th Am. ed., 196-197.

<sup>2</sup> Earl of Buckingham v. Drury, 3 Brown's Par. Cas., 492.

<sup>3</sup> Trollope v. Linton, 1 Sim. & Stu., 477, 487.

<sup>4</sup> See Williams' Real Property, 172, 1st ed.; 182, 2d ed.; 189, 3d ed.; 190, 4th ed.; 199, 5th ed.; 209, 6th ed.; 213, 7th ed.; 223, 8th ed.; 6th Am. ed., 191 *et seq.*

were to be answered by her natural protector. The wife was considered as merged in her husband, and both were regarded as but one person.<sup>1</sup> So long therefore as the coverture continued, that is, during the joint lives of the husband and wife, the husband was absolutely entitled to all personal property which his wife might acquire, and was also liable to the payment of all debts which she might previously have incurred. These simple principles still pervade the common law relating to the husband's interest in his wife's personal estate; although the several different species of personal estate to which modern civilization has given rise, conjoined with the rules of equitable administration laid down by the Court of Chancery, have given to this branch of law a perplexity unknown to the simple, though somewhat harsh, rules of our ancestors.

In the first place, then, personal property of the ancient kind, namely, chattels, personal or movable goods, belonging to the wife at the time of her marriage, or given to her afterwards, became the absolute property of her husband in the same manner precisely as if they had been originally his own, or had been subsequently given to him.<sup>2</sup> He might dispose of them as he pleased in his lifetime or by his will; they were subject to his debts; and, if he died intestate, the wife had no further claim to them than to any other of his effects. So imperative was this rule that, if chattels personal were given to a married woman jointly with a stranger, the law instantly severed the jointure, and made the husband and the stranger tenants in common.<sup>3</sup>

The only exceptions to this sweeping rule were the wife's *paraphernalia*, so called from the Greek *παραφερνή*, being things to which the wife is entitled over and above her dower. The wife's paraphernalia consisted of her apparel and ornaments suitable to her rank and degree;<sup>4</sup> and gifts made by the husband to his wife of jewels or trinkets to be worn by her as ornaments were con-

<sup>1</sup> Williams' Real Property, 164, 1st ed.; 176, 2d ed.; 183, 3d ed.; 184, 4th ed.; 190, 5th ed.; 200, 6th ed.; 207, 7th ed.; 214, 8th ed.; 6th Am. ed., 181.

<sup>2</sup> Co. Litt., 300 a; 351 b; Bac. Abr., tit., Baron and Feme (C.), 3; 1 Rep. Husband and Wife, 169.

<sup>3</sup> Bracebridge v. Cook, Plowden, 411. See *Re Barton's Will*, 10 Hare, 12.

<sup>4</sup> 2 Bl. Com., 436; 2 Rep. Husband and Wife, 140; 11 Vin. Abr., tit., Executors (Z., 5).

sidered as part of her paraphernalia.<sup>1</sup> These articles, equally with the wife's other personal chattels, might be disposed of by the husband in his lifetime,<sup>2</sup> and, with the exception of the wife's necessary clothing, were also liable to his debts.<sup>3</sup> The wife also herself had no power to dispose of them by gift or will during her husband's lifetime.<sup>4</sup> But paraphernalia differed from the wife's other personal chattels in this respect, that the husband, though he might dispose of them in his lifetime, had no power to bequeath them away from his wife by his will.<sup>5</sup> Gifts of jewelry or trinkets made to the wife by a relative or friend, either upon or after her marriage, were generally considered in equity as intended for her *separate use*,<sup>6</sup> in which case they were not reckoned amongst her paraphernalia, but were, as we shall hereafter see, exempt from the control and debts of her husband, and might be disposed of by the wife in the same manner as if she were unmarried.

With regard to such of the wife's personal estate as was not in possession, but for which she had only a right to sue, the rights of the husband were different, according as the proceedings against the persons liable to be sued must have been taken in a court of law or of equity. Property of this nature, as we have already seen,<sup>7</sup> is termed in law French *choses in action*, such as may be recovered by action at law being called legal choses in action, and such as may be recovered by suit in equity being called equitable choses in action. With regard to each of them, the rights of the husband were of a different kind, although in each the same rule applied that if he could get them into his possession during the coverture he had a right to keep them, otherwise they belonged to his wife.<sup>8</sup>

Legal choses in action consist principally of debts due to the wife, and secured or not by bond, or by bills or promissory notes. Of all these the husband had a right to receive payment, and, should

<sup>1</sup> *Graham v. Londonderry*, 3 Atk., 394; *Jervoise v. Jervoise*, 17 Beav., 566.

<sup>2</sup> *Ibid.*; 2 Rop. Husband and Wife, 141.

<sup>3</sup> 2 Bl. Com., 436; *Ridout v. Earl of Plymouth*, 2 Atk., 104; *Lord Townsend v. Wyndham*, 2 Ves., Sr., 1, 7.

<sup>4</sup> 2 Rop. Husband and Wife, 141.

<sup>5</sup> *Tipping v. Tipping*, 1 R. Wms., 730; *Northey v. Northey*, 2 Atk. 77.

*Graham v. Londonderry*, 3 Atk., 394; 2 Rop. Husband and Wife, 143; *post*, p. 349.

<sup>7</sup> *Ante*, p. 7.

<sup>8</sup> 2 Bl. Com., 434; 1 Williams on Executors, pt. 2, bk. 3, c. 1, s. 3.

payment be refused him, he might sue for them in the joint names of himself and his wife;<sup>1</sup> but bills and notes of the wife payable to order, being transferable by endorsement, might be endorsed by the husband alone,<sup>2</sup> or sued for in his own name.<sup>3</sup> All such legal choses in action as accrued to the wife *after* her marriage might be sued for by the husband, either in the joint names of himself and his wife, or in his own name only;<sup>4</sup> but, if the wife had really no interest, he could not make use of her name.<sup>5</sup> If the husband should sue in the joint names of himself and his wife, the benefit of the judgment of the court in case of his decease survived to her;<sup>6</sup> but, if he sued in his own name, the benefit of the judgment formed part of his own personalty. If, however, the husband should not have received the money in his lifetime, or should not have obtained judgment for it in his own name, his wife on his decease was entitled by survivorship to the chose in action so remaining still unreduced into possession;<sup>7</sup> and bills and notes formed no exception to this rule.<sup>8</sup> But, if the wife should die before her husband, these choses in action, still remaining unreduced, formed part of her personal estate; and her husband must have taken out administration to her effects before he could proceed to recover them;<sup>9</sup> they, with the rest of her personalty, belonged to himself absolutely, after payment of her debts.<sup>10</sup> The only exception to this rule occurred in the case of the husband being entitled, in right of his wife, to "any estate in fee simple, fee tail, or for term of life, of or in any rents or fee-farms;" in which case the husband, after the death of his wife, was empowered by statute<sup>11</sup> to recover the arrears accrued to his wife before marriage by action of debt or

<sup>1</sup> 1 *Rop. Husband and Wife*, 213, 214; *Sherrington v. Yates*, 12 M. & W., 855. In this case, the note was not payable to order and therefore not negotiable.

<sup>2</sup> *Mason v. Morgan*, 2 Ad. & E., 30 (29 E. C. L.).

<sup>3</sup> *Burrough v. Moss*, 10 B. & C., 558 (21 E. C. L.).

<sup>4</sup> 1 *Rop. Husband and Wife*, 213.

<sup>5</sup> *Abbott v. Blofield*, Cro. Jac., 644.

<sup>6</sup> *Oglander v. Baston*, 1 Vern., 396; 1 *Rop. Husband and Wife*, 212.

<sup>7</sup> Co. Litt., 351, b.

<sup>8</sup> *Richards v. Richards*, 2 B. & Ad., 447 (22 E. C. L.); *Gaters v. Madeley*, 6 M. & W., 423; *Hart v. Stephens*, 6 Q. B., 937 (51 E. C. L.); *Scarpellini v. Atcheson*, 7 Q. B., 864 (53 E. C. L.).

<sup>9</sup> 1 *Rop. Husband and Wife*, 205. See *Betts v. Kimpton*, 2 B. & Ad., 273 (22 E. C. L.).

<sup>10</sup> Stat. 29 Car. II., c. 3, s. 25, *ante*, p. 335.

<sup>11</sup> Stat. 32 Henry VIII., c. 37, s. 3.

distress. But this provision did not apply to the rents reserved upon leases for years.<sup>1</sup>

Equitable choses in action consist principally of legacies, residuary personal estate of testators, and money in the funds. But all kinds of property, including, as is now decided, both freehold estates<sup>2</sup> and chattels real,<sup>3</sup> vested in trustees, who are answerable only to the court of chancery, are subject to a rule of equity, by which equitable choses in action are mainly distinguished from such as are merely legal. This rule is as follows: that the court of chancery will not assist, nor, if the wife should dissent, will it allow, the husband to recover or receive any property of his wife recoverable only in that court without his settling a due proportion of such property on his wife and children.<sup>4</sup> The right of the wife to such a provision is termed *the wife's equity for a settlement*.<sup>5</sup> In fixing the proportion to be settled, a prior settlement will always be taken into account.<sup>6</sup> But, where no settlement has previously been made, the proportion required to be settled on the wife is most frequently one-half,<sup>7</sup> and sometimes the court has gone so far as to require a settlement of the whole fund.<sup>8</sup> Although the children are usually inserted in the settlement, yet the right is personal to the wife, and may be waived by her;<sup>9</sup> nor will it survive to the children in case of her decease before the court has made its

<sup>1</sup> Prescott v. Boucher, 3 B. & Ad., 849 (23 E. C. L.).

<sup>2</sup> Sturgis v. Champneys, 5 Myl. & Cr., 97; Wortham v. Pemberton, 1 De G. & Sm., 644; Gleaves v. Paine, 1 De G., J. & Sm., 87. See, however, Sugd. V. & P., 450, 13th ed.; 560, 14th ed.

<sup>3</sup> Hanson v. Keating, 4 Hare, 1.

<sup>4</sup> It was formerly held that the wife's equity to a settlement did not extend to sums under 200*l.*; Fodon v. Finney, 4 Russ., 428; but this distinction is now abolished; *In re Cutler*, 14 Beav., 220; *Re Kincaid*, 1 Drew., 326.

<sup>5</sup> 1 Rop. Husb. and Wife, 256, *et seq.*

<sup>6</sup> March v. Head, 3 Atk., 720; Lady Elibank v. Montolieu, 5 Ves., 737; Erskine's Trust, 1 Kay & John., 302; Spirett v. Willows, L. C., 12 Jur. N. S., 538; s. c., 1 Law Rep. Ch. Ap., 520.

<sup>7</sup> 1 Rop. Husb. and Wife, 260; Archer v. Gardiner, 1 C. P. Coop., 430.

<sup>8</sup> Brett v. Greenwell, 3 You. & Coll., 230; Gardiner v. Marshall, 14 Sim., 575; Scott v. Spashett, 3 Macn. & G., 599; Dunkley v. Dunkley, L. C., 16 Jur., 767; s. c., 2 De G., M. & G., 390; Marshall v. Fowler, 16 Beav., 249; Gent v. Harris, 10 Hare, 383; *Re Welchman*, 1 Giff., 31.

<sup>9</sup> Murray v. Lord Elibank, 13 Ves., 6. But the wife having once insisted on her right cannot afterwards waive it; Barker v. Lea, 6 Mad., 630; Whittem v. Sawyer, 1 Beav., 593

decree;<sup>1</sup> but if she die after the decree, it will still be carried into effect for the benefit of the children.<sup>2</sup> This rule of the court of chancery is founded on one of the maxims of equity, that he who would have equity must do what is equitable;<sup>3</sup> it cannot, therefore, be enforced until the time arrives when the fund becomes payable to the husband.<sup>4</sup> If, however, as most frequently happens, the husband can obtain from the executor or trustee of the fund in question payment of it to himself, without the assistance of the court, he has a right to do so, and in this case the wife's equity is at once excluded; and, if the time of payment has arrived, the executor or trustee may safely pay over the fund to the husband, unless the wife shall have already filed her bill in chancery to enforce her right to a settlement;<sup>5</sup> and the receipt of the fund by the husband, when it has thus become payable, is also an effectual bar to the wife's right by survivorship.<sup>6</sup>

If the husband, instead of obtaining payment of the fund, should assign it to a third person,<sup>7</sup> or if he should become bankrupt,<sup>8</sup> his assignee will take, subject to the wife's equity for a settlement, in the same manner as if no assignment had been made. But, if the interest to which the wife is entitled consists of an equitable estate for her life only, an assignee from the husband of such life interest for valuable consideration will be entitled to hold it as against the wife's equity for a settlement,<sup>9</sup> although she would be entitled to a settlement as against his assignees, or now his creditors' trustee, in bankruptcy.<sup>10</sup> If the husband should die

<sup>1</sup> *De La Garde v. Lempriere*, 6 Beav., 344; overruling *Steinmetz v. Halthin*, 1 Glyn. & Jam., 64; *Baker v. Bayldon*, 8 Hare, 210; *Wallace v. Auldjo*, V.-C. K., 9 Jur. N. S., 687; s. c., 2 Drew. & Sm., 216; affirmed by Lords Jus., 11 W. R., 972; s. c., 1 De G., J. & S., 643.

<sup>2</sup> *Groves v. Clarke*, 1 Keen, 132; s. c., *Groves v. Perkins*, 6 Sim., 584.

<sup>3</sup> *Milner v. Colmer*, 2 P. Wms., 641.

<sup>4</sup> *Osborn v. Morgan*, 9 Hare, 432.

<sup>5</sup> 1 *Rop. Husband and Wife*, 273; *Murray v. Lord Elibank*, 10 Ves., 90.

<sup>6</sup> 1 *Rop. Husband and Wife*, 220; *Rees v. Keith*, 11 Sim., 383; *Cunningham v. Antrobus*, 16 Sim., 436.

<sup>7</sup> 1 *Rop. Husband and Wife*, 271; *Malcom v. Charlesworth*, 1 Keen, 73, 74; *Scott v. Spashett*, 3 Macn. & G., 599; *Carter v. Taggart*, 5 De G. & Sm., 49; s. c., 1 De G., M. & G., 286. See *Ward v. Yates*, 1 Drew. & S., 80.

<sup>8</sup> 1 *Rop. Husband and Wife*, 268.

<sup>9</sup> *Elliot v. Cordell*, 5 Mad., 149; *Stanton v. Hall*, 2 Russ. & My., 175, 182; *Tidd v. Lister*, 10 Hare, 140, 154; s. c., 3 De G., M. & G., 857; *Re Duffy's Trust*, 28 Beav., 386.

<sup>10</sup> *Wright v. Morley*, 11 Ves., 17.

before the assignee has got possession of the fund, leaving his wife surviving, the wife's right by survivorship will prevail over the title of the assignee, whether in bankruptcy<sup>1</sup> or for valuable consideration.<sup>2</sup>

The same principle of the merger of the wife in the husband, which gave him such important rights in her personal estate, rendered him answerable for all the debts and liabilities of his wife contracted previously to her marriage.<sup>3</sup> But, if the judgment for any debt was not recovered during the continuance of the marriage, the liability ceased, except to the extent of the assets to which the husband might be entitled as his wife's administrator;<sup>4</sup> and, if the wife survived, she again became solely liable. The husband is also bound during the coverture to supply his wife with necessaries suitable to her station in life. She is, therefore, whilst living with him, considered as his agent for the purchase of any such necessary articles with which he may not have supplied her.<sup>5</sup> And, even if the articles should not be necessaries, yet if the husband be aware of the purchase,<sup>6</sup> or if he recognize it by allowing his wife to use or wear the articles bought,<sup>7</sup> she will be considered as having bought them with his authority, and he will, consequently, be liable to pay for them.

The burdens with which the husband was thus chargeable were the consideration which he paid for his marital rights in his wife's property. It was, therefore, a rule of law that the husband should not, previously to the marriage, be defrauded of those rights by his intended wife.<sup>8</sup> Accordingly, if the wife, after an engagement to marry, should assign away any of her property without the knowledge and consent of her intended husband, such assignment was void as a fraud on his marital rights.<sup>9</sup> And the circumstance of the

<sup>1</sup> *Pierce v. Thornley*, 2 Sim., 167.

<sup>2</sup> *Hutchings v. Smith*, 9 Sim., 137; *Ellison v. Elwin*, 13 Sim., 309; *Ashby v. Ashby*, 1 Coll., 553; *Le Vasseur v. Scrutton*, 14 Sim., 116; *Michelmores v. Mudge*, 2 Giff., 183.

<sup>3</sup> 2 *Roper's Husband and Wife*, 73; *Palmer v. Wakefield*, 3 Beav., 227; *Luard's Case*, 1 DeG., F. & J., 533.

<sup>4</sup> *Heard v. Stamford*, 3 P. Wms., 409.

<sup>5</sup> 2 *Roper's Husband and Wife*, 110; *Seaton v. Benedict*, 5 Bing. 28 (15 E. C. L.).

<sup>6</sup> *Petty v. Anderson*, 3 Bing., 170 (11 E. C. L.).

<sup>7</sup> See *Montague v. Benedict*, 3 B. & C., 631, 638 (10 E. C. L.).

<sup>8</sup> *Countess of Strathmore v. Bowes*, 1 Ves., Jr., 22, 28.

<sup>9</sup> *England v. Downs*, 2 Beav., 522; *Taylor v. Pugh*, 1 Hare, 608; *Prideaux v.*

intended husband's being ignorant of her possession of the property in question would be immaterial.<sup>1</sup>

The right of the husband to the whole of his wife's personal estate, in the event of her decease in his lifetime, might be waived by his giving her authority to dispose of such estate, or any part of it, by her will; and such a will was valid and binding on the husband if he once allowed it to be proved.<sup>2</sup> But, during his wife's lifetime, and even after her death, until probate of the will, this authority might be revoked; and, if the husband should die before the wife, such a will was not binding on the wife's next of kin.<sup>3</sup>

But, at the present day, power to dispose of property of any kind may be given to a married woman, independently of her husband, by means of a trust for her *separate use*, which trust may be enforced in equity.<sup>4</sup> When personal estate is so given, the wife has the same powers of ownership as if she were a feme sole; she may, accordingly, dispose of such property without her husband's concurrence, either in her lifetime or by her will.<sup>5</sup> But, should she die in his lifetime without having made any disposition, her husband became entitled to it either in his marital right<sup>6</sup> or as her administrator,<sup>7</sup> according as the property was in possession or in action. A trust for a woman's *separate use* is properly and technically created by means of the words "separate use."<sup>8</sup> A gift, however, to a woman for her sole use has now been decided not to create a trust for her separate use unless aided by the context.<sup>9</sup>

Lonsdale, 4 Giff. 159; affirmed, 1 DeG., J. & S., 433; Downes v. Jennings, 32 Beav., 290.

<sup>1</sup> Goddard v. Snow, 1 Russ., 485.

<sup>2</sup> 1 Rop. Husband and Wife, 169, 170.

<sup>3</sup> 15 Ves., 156.

<sup>4</sup> See Williams' Real Property, 164, 1st ed.; 174, 2d ed.; 181, 3d ed.; 18, 3d ed.; 182, 4th ed.; 190, 5th ed.; 200 6th ed.; 207, 7th ed.; 214, 8th ed.; 6th Am. ed., 182 *et seq.*

<sup>5</sup> Fettiplace v. Gorgas, 1 Ves., Jr., 46; s. c., 3 Bro. C. C., 8; 2 Rop. Husband and Wife, 182.

<sup>6</sup> Molony v. Kennedy, 10 Sim., 174; Tugman v. Hopkins, 4 Man. and Gran., 884 (43 E. C. L.).

<sup>7</sup> Watt v. Watt, 3 Ves., 246, 247; Proudley v. Fielder, 2 Myl. & K., 57.

<sup>8</sup> Lee v. Prieaux, 3 Bro. C. C., 381.

<sup>9</sup> Massy v. Hayes, L. J., Ireland, 15 W. R., 376; affirmed in the House of Lords, 16 July, 1869; Gilbert v. Lewis, 1 De G., J. & S., 38.



And a gift to a woman for her own use,<sup>1</sup> or to be paid into her proper hands<sup>2</sup> for her own proper use and benefit,<sup>3</sup> has been held not to be sufficient to exclude the rights of her husband.

A simple gift of property for a married woman's separate use is not so usual as the gift of the income only of the property during her life or during the joint lives of herself and her husband. A gift of the income of property to a woman's separate use may be made either after her marriage, or in contemplation of marriage, or whilst she is sole; and the gift may be made either independently of her present husband, if any, or of any future husband. When the gift is made to a woman's separate use, independently of any future husband, the act of her marriage will confer no interest in the property on her husband, but she will enjoy, after marriage, the same interest and power of disposition as she had before.<sup>4</sup> It is, however, more usual, when the income only of property is given to a wife's separate use, to insert a condition that she shall not dispose of the same in any mode of anticipation. Conditions restraining the alienation of property are generally invalid, as being contrary to the policy of the law. But the courts of equity have made an exception to this rule in favor of married woman; and, having once established a trust for a woman's separate use, they have permitted such a trust to be made effectual by depriving the wife herself of the power of disposition.<sup>5</sup> When the income of property is given to a woman's separate use, without power of anticipation, she is not thereby deprived of the power of alienation so long as she continues single.<sup>6</sup> Previously to or in contemplation of marriage she may therefore make such disposition or settlement of such income as she may think proper. But, should she marry without a settlement, the restraint on alienation will then attach, and so long as she remains under coverture she will have no further power than that of receiving the income as it grows due.<sup>7</sup> On her widowhood her

<sup>1</sup> *Roberts v. Spicer*, 5 Madd., 491; *Kensington v. Dollond*, 2 Myl. & K., 184.

<sup>2</sup> *Tyler v. Lake*, 2 Russ. & Myl., 183.

<sup>3</sup> *Blacklow v. Laws*, 2 Hare, 49.

<sup>4</sup> *Tullett v. Armstrong*, 1 Beav., 1; 4 Myl. & Cr., 390; *Scarborough v. Borman*, 1 Beav., 34; 4 Myl. & Cr., 377.

<sup>5</sup> *Brandon v. Robinson*, 18 Ves., 434; *Robinson v. Wheelwright*, 6 De G., M. & G., 535.

<sup>6</sup> *Woodmeston v. Walker*, 2 Russ. & Myl., 197; *Brown v. Pocock*, 2 Russ. & Myl., 210.

<sup>7</sup> *Tullett v. Armstrong*, 1 Beav., 1; s. c., 4 Myl. & Cr., 390; *Scarborough v. Borman*, 1 Beav., 34; s. c., 4 Myl. & Cr., 377; *Clive v. Carew*, 1 Johns. & H., 199.

power of alienation will again revive,<sup>2</sup> but will cease on her second marriage without having previously made any disposition,<sup>3</sup> provided the restriction on alienation be not, by the terms of the gift, confined to her first marriage.<sup>3</sup> The intention to restrain alienation ought always to be clearly expressed. A direction to pay the income of property into the hands of a married woman, and not otherwise,<sup>4</sup> or on her personal appearance and receipt,<sup>5</sup> will not be sufficient to restrain her from disposing of her interest, the words being considered as intended only to exclude the marital claims of her husband. But, if an intention can be collected from the terms of the instrument, not only to exclude the husband's claims, but also to prevent the wife from anticipating, such intention will prevail, although it may be expressed rather in popular than in strictly technical language.<sup>6</sup>

In addition to trusts for separate use, powers of appointment may be given to married women independently of their husbands, by means of which they may be enabled to dispose of property without their husband's concurrence; and any appointment under a general power may be made by a married woman in favor of her husband, as well as of any other person.<sup>7</sup>

At the present day, legislation, both in England and throughout the United States, has made important innovations upon the common law rules as to the property rights of married women. The enactments differ in the different States, but their leading features are similar. They provide, generally, that the right of a married woman to any property, whether real or personal, belonging to her at the time of marriage, or acquired during marriage, otherwise than by gift or conveyance from her husband, shall be as absolute as if she were unmarried, and shall not be subject to the husband's disposal, or liable for his debts; that she may contract, and sue and be sued, in her own name, in all matters having relation to her separate property, and may convey, devise and bequeath the same, in like manner as if she were unmarried.

<sup>2</sup> *Barton v. Briscoe*, Jacob, 603.

<sup>3</sup> *Tullett v. Armstrong*, *ubi supra*.

<sup>3</sup> *Re Gaffe*, 1 MacN. & G., 541.

<sup>4</sup> *Acton v. White*, 1 Sim. & Stu., 429.

<sup>5</sup> *Ross's Trust*, 1 Sim., N. S., 196.

<sup>6</sup> *Brown v. Bamford*, 1 Phil., 620; *Moore v. Moore*, 1 Coll., 54; *Harrop v. Howard*, 3 Hare, 624; *Harnet v. Macdougall*, 8 Beav., 187; *Field v. Evans*, 15 Sim., 375; *Baker v. Bradley*, 7 De G., M. & G., 597; *Goulder v. Camm*, De G., F. & J., 146.

<sup>7</sup> *Williams' Real Prop.*, 6th Am. ed., 260.

Under these statutes, generally, the wife's power to contract is, according to the weight of authority, restricted to matters having relation to her separate property; she cannot, ordinarily, be sued upon her promissory note, because such an instrument would not, upon its face, show any relation to her separate estate; nor can the holder establish his right to recover by proof that, when she gave the note, she expressly agreed to pay it from her separate estate, for this would be adding to a written contract by evidence of contemporaneous oral stipulations.<sup>1</sup> Indeed, under the strict rules of construction adopted by some of the courts, if the entire contract was oral, and embraced a provision to pay out of the separate estate, or if the written contract embraced such a promise, the common law invalidity would still prevail unless the contract itself, independently of such promise, was *in a matter* relating to the wife's property. A wife's promise, for example, to pay out of her separate property for supplies furnished to herself and family, or for furniture sold to her husband and to herself, has been held void, even under the modern Married Women's Acts, because the supplies and the furniture were without relation to her separate estate.<sup>2</sup> But, if she owns a farm, and purchases cattle to stock or labor to cultivate it; if she owns a house, and buys furniture with which to furnish it; if debts are due to her, and she employs an attorney to collect them; if she owns mortgaged property, and borrows money for the ostensible purpose of paying interest due upon the mortgage, whether actually used for that purpose or not—in all these cases, the contract is in a matter having relation to her property, and is, therefore, valid.<sup>3</sup> And perhaps the weight of authority sustains the view that the promise to pay out of the separate estate sufficiently connects the contract with the property.<sup>4</sup> Ownership of a separate estate must precede the promise—the same contract

<sup>1</sup> *Yale v. Dederer*, 68 N. Y., 329; *a. c.*, 18 N. Y., 265; 22 N. Y., 458; *Bailey v. Pearson*, 29 N. H., 77.

<sup>2</sup> *Schneider v. Garland*, 1 Mackey, 350; *Solomon v. Garland*, 2 Mackey, 113; *Emmons v. Harlan*, 5 Mackey, 521.

<sup>3</sup> *Batchelder v. Sargent*, 47 N. H., 262; *Cookson v. Toole*, 59 Ill., 515; *Harmon v. Garland*, 1 Mackey, 1; *Owen v. Cawley*, 36 N. Y., 600; *McVey v. Cantrell*, 70 N. Y., 295.

<sup>4</sup> *Hammond v. Corbett*, 51 N. H., 311; *Corn Exchange Ins. Co. v. Babcock*, 42 N. Y., 613; *Maxon v. Scott*, 55 N. Y., 247; and see *Williams v. Huguenin*, 69 Ill., 214.

cannot create the separate estate, and then relate to it; thus, money borrowed with which to purchase a separate estate, or a note or bond given for the purchase money of the property relied upon as the separate estate, creates no personal liability upon the part of the wife, though doubtless chargeable on the property in equity.<sup>1</sup>

In the absence of express statutory provision to that effect, property purchased by, or in the name of, the wife, with her earnings during the coverture, does not become her separate property, but is liable to prior debts of the husband.<sup>2</sup> The statutes in question do not, ordinarily, deprive the husband of his common law right to the wife's earnings; and, if not, his permitting her to retain them is not only a voluntary gift upon his part, and so void as against existing creditors, but falls within the express exception, usually contained in them, of *property acquired by gift or conveyance from the husband*. And the legal presumption is that property acquired by the wife during coverture was a gift from the husband; the burden of proof is upon her to establish the contrary.<sup>3</sup> But, if the husband allows the earnings of the wife, or moneys given her by him, to be invested in property in her name, it becomes a settlement by him upon her, which he himself cannot afterwards recall or control.<sup>4</sup>

From the foregoing, it is apparent that, at the present day, there are three distinct methods, varying materially in legal consequence and effect, by which property may become vested in married women, namely: First, by gift or conveyance from the husband, in which case, at least in so far as the rights of prior creditors are concerned, the rules of the old common law will prevail; secondly, by settlement or conveyance in trust for her sole and separate use, creating an equitable separate estate,<sup>5</sup> ordinarily bound by all her contracts, whether written or oral, and whether in matters respecting her separate estate or not; and, thirdly, by ownership at the time of marriage, or acquisition during marriage otherwise than by gift or conveyance from the husband, frequently designated, by way of distinction from that last mentioned, her *legal* separate estate, the leading rules respecting which have just been stated.

<sup>1</sup> Ames v. Foster, 42 N. H., 381; Rich v. Hyatt, 3 McArthur, 536; *contra*, wife liable, Ballin v. Dillage, 37 N. Y., 35.

<sup>2</sup> Seitz v. Mitchell, 94 U. S., 580.

<sup>4</sup> Jackson v. Jackson, 91 U. S., 122.

<sup>3</sup> Seitz v. Mitchell, *supra*.

<sup>5</sup> *Supra*, pp. 349-351.

The distinctions between her equitable and her legal separate estate, especially in reference to the sufficiency or insufficiency of her contracts to charge her or them, are material.<sup>1</sup>

Unhappy differences between husband and wife sometimes end in a separation. Such a state of things is not, however, encouraged by the law. A clause in a marriage settlement providing for the event of a separation, has been considered to be void;<sup>2</sup> and so has a condition in a gift of personal estate to a woman living apart from her husband, that the gift shall cease in case she should cohabit with him.<sup>3</sup> It is however clear that a deed making provision for an immediate separation between husband and wife is not void for illegality;<sup>4</sup> and any infringement of the covenants contained in it will be restrained by the injunction of the court of chancery.<sup>5</sup> One of the usual provisions of a deed of separation is a covenant on the part of some friend of the wife's to indemnify the husband against any debts she may incur whilst living apart. Such a covenant is a valuable consideration for any settlement which the husband may make for the benefit of his wife, and places such settlement on the same footing as any other alienation made for valuable consideration.<sup>6</sup> But, if there be no such covenant, nor any other valuable consideration,<sup>7</sup> a settlement made by a husband on separating from his wife stands in the same position as any other voluntary deed;<sup>8</sup> and, though binding on himself, may not be binding on his creditors.<sup>9</sup> The circumstance of voluntary separation gives to the wife no further power of disposition over property than she possessed whilst living with her husband.<sup>10</sup> Accordingly she will not, should she survive her husband, be bound by any disposition of her personal estate made on the separation, which

<sup>1</sup> See *Lippincott v. Mitchell*, 94 U. S., 767; *Emmons v. Harlan*, 5 Mackey, 521.

<sup>2</sup> *Cocksedge v. Cocksedge*, 14 Sim., 244; *Cartwright v. Cartwright*, 3 De G., M. & G., 982; *H. v. W.*, 3 Kay J., 382. See also *Hindley v. Marquis of Westmeath*, 6 B. & C., 200 (13 E. C. L.); *Merryweather v. Jones*, 4 Giff., 499.

<sup>3</sup> *Wren v. Bradley*, 2 De G. & Sm., 49.

<sup>4</sup> *Jones v. Waite*, 4 Man. & Gr., 1104 (43 E. C. L.).

<sup>5</sup> *Sanders v. Rodway*, 16 Beav., 207.

<sup>6</sup> *Stephens v. Olive*, 2 Bro. C. C., 90; *Worrall v. Jacob*, 3 Meriv., 256, 269.

<sup>7</sup> See *Wilson v. Wilson*, 14 Sim., 405; 1 H. of L. Cas., 538.

<sup>8</sup> See *ante*, p. 299.

<sup>9</sup> *Fitzer v. Fitzer*, 2 Atk., 511; *Clough v. Lambert*, 10 Sim., 174.

<sup>10</sup> *Lord St. John v. Lady St. John*, 11 Ves., 531.

her husband would have been unable to make, without her concurrence, had no separation taken place.<sup>1</sup> If after separation the parties become reconciled,<sup>2</sup> the provisions of the deed of separation will thenceforth become inoperative.

In the event of separation, the custody of the infant children belongs by law to the father as the natural guardian.<sup>3</sup> And it has been decided that he is incompetent to relinquish a duty thrown upon him by the law; and that, therefore, a covenant on his part to give up the children to the care of their mother is illegal.<sup>4</sup> If, however, the conduct of the father should be such that the children would be exposed to cruelty or gross corruption of morals from being left in his custody, the law will deprive him of a charge for which he has shown himself totally unfit.<sup>5</sup>

The young of animals belong to the owner of the mother, except in the case of young cygnets, which, for some reason not very clearly explained, seem to form an exception.<sup>6</sup> In the human family, however, under the common law, the right to the custody and to the services of the children during their minority always belonged to the father.<sup>7</sup> He was the "house-bond"—the bond which kept or held the family together—and was entitled to control and direct the custody, society, conduct and domicile of the persons who constituted the family. But, in proceedings for separation or divorce, the custody of the children is a matter within the discretion of the court. Where the "bond" is no longer to keep the household together, and especially where the dissolution is the result of the husband's own fault or misconduct, that theoretical right can no longer be contended for by him. The court is then at liberty to consult the interests of the chil-

<sup>1</sup> *Stamper v. Baker*, 5 Madd., 157; *Slatter v. Slatter*, 1 You. & Col., 28.

<sup>2</sup> *Bateman v. Roes*, 1 Dow, 235, 245; *Lord St. John v. Lady St. John*, 1 Ves., 537; *Wilson v. Wilson*, 15 Sim., 487, 500; 1 H. of L. Cas., 538. See, however, *Hulme v. Chitty*, 9 Beav., 437.

<sup>3</sup> *Co. Litt.*, 83 b, n. (12); *Rex v. Sherrington*, 3 B. & Ad., 714 (23 E. C. L.).

<sup>4</sup> *Lord St. John v. Lady St. John*, 11 Ves., 531; *Vansittart v. Vansittart*, 4 Kay & J., 62; s. c., 2 De G. & J., 249; *Hope v. Hope*, 22 Beav., 351; s. c., 3 Jur. N. S., 454, *Lords Just.*; s. c., 8 De G. M. & G., 731; *Walrond v. Walrond*, 1 John, 18.

<sup>5</sup> *Cruise v. Hunter*, 2 Bro. C. C., 400; *Wellesley v. Duke of Beaufort*, 2 Russ., 1; *Rex v. Greenhill*, 4 Ad. & E., 624 (31 E. C. L.); *Swift v. Swift*, L. J., 11 Jur. N. S., 458; 34 Law Journ. Chancery, 394.

<sup>6</sup> 2 Bl. Com., 390.

<sup>7</sup> 1 Bl. Com., 453; 2 Kent Com., 193.

dren, and to make such order in regard to their custody as shall be most for their benefit. And it is accordingly held that, in the determination of the question, the interest of the child is the leading, if not the paramount, consideration.<sup>1</sup> The legal rights of the parents, however, will not be wholly ignored;<sup>2</sup> they are to be considered in connection with other circumstances. If the separation be without fault upon the part of the father, and he is a proper person in other respects, the custody of the children will ordinarily be awarded to him.<sup>3</sup> If the child be a female, or of very tender years, the mother may be preferred to the father even though somewhat in fault,<sup>4</sup> if the fault be not of such a character as, in the opinion of the court, to jeopardize the child's interests.<sup>5</sup> Where its interests require it, the custody may be taken from both parents and given to a third person, as, for example, to a grandfather.<sup>6</sup> Sometimes the custody is divided, some of the children being awarded to the mother and some to the father; and sometimes, especially if the mother be the party in fault, the younger children may be awarded to her until they reach a certain age, and then given to the father.<sup>7</sup> Where the conflict grows out of the differing religious beliefs of the parents, the father has generally been held entitled to the custody and to the right to educate the children in his faith;<sup>8</sup> and even his agreement with the wife before the marriage, waiving that right, it seems, is ineffectual against him, it being held contrary to public policy that a father should agree to abdicate his duties in regard to the care, education and training of his children.<sup>9</sup>

<sup>1</sup> *Wand v. Wand*, Cal., 513. *Cole v. Cole*, 23 Iowa, 433; *Lusk v. Lusk*, 28 Mo., 91.

<sup>2</sup> *Hunt v. Hunt*, 4 Greene, 216; *Adams v. Adams*, 1 Duvall, 167.

<sup>3</sup> *Ex parte Hewitt*, 11 Rich. L., 326; *Miner v. Miner*, 11 Ill., 43. But see *Darnall v. Mullikin*, 8 Ind., 152.

<sup>4</sup> *Commonwealth v. Addicks*, 5 Binn., 520; *Dailey v. Dailey*, Wright, 514.

<sup>5</sup> See *Helden v. Helden*, 7 Wisc., 296, 303; *Leavitt v. Leavitt*, Wright, 719.

<sup>6</sup> *Rice v. Rice*, 21 Tex., 58.

<sup>7</sup> But see *People v. Humphrey*, 14 Barb., 521—Mother, separating from the father without good cause, not entitled to custody of a child only six months old, unless its health imperatively demands her care.

<sup>8</sup> *Re Agar Ellis*, 10 Ch. D., 49; *Re Besant*, 11 Ch. D., 508.

<sup>9</sup> *Ibid*; but see *Andrews v. Salt*, L. R., 8 Ch. App., 622, 636.

## PART V.

### OF TITLE.

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THE title to personal estate varies according as it may consist of money or negotiable securities, of ordinary choses in possession, or of choses in action.

And, first, with regard to money or negotiable securities, no title at all is required to be shown by the payer in any *bona fide* transaction. Thus, if a sovereign or a bank note be offered in payment of a debt, it is no part of the duty of the creditor, under ordinary circumstances, to ask the debtor how he came by it. The reason of this rule is founded on the currency of the articles in question, and on the great inconvenience to trade and commerce which would ensue if the rule were otherwise.<sup>1</sup> And the rule applies to all negotiable securities, that is, to all instruments the delivery of which passes the legal right to the property secured by them. Promissory notes and bills of exchange payable to bearer, or payable to order and endorsed in blank, are accordingly within the rule.<sup>2</sup> But, if there be any *mala fides* on the part of the person receiving any money or negotiable security, or such gross negligence as may amount in itself to evidence of *mala fides*, the true owner may recover such property, provided its identity can be ascertained.<sup>3</sup> A

<sup>1</sup> *Miller v. Race*, 1 Burr., 452; s. c., *Smith's Leading Cas.*, 9th Am. ed., 750.

<sup>2</sup> *Grant v. Vaughan*, 3 Burr., 1516; *Peacock v. Rhodes*, 2 Doug., 333; see *ante*, p. 124.

<sup>3</sup> *Clarke v. Shee*, Cowp., 197; *Foster v. Pearson*, 1 C. M. & R., 849; s. c., 5 Tyrw., 255; *Goodman v. Harvey*, 4 Ad. & E., 870 (31 E. C. L.).

See *Mauran v. Lamb*, 7 Cowen, 174; *Pearce v. Austin*, 4 Wheat, 489; *Barbarin v. Daniels*, 7 La., 481; *Denton v. Duplessis*, 12 *Ibid.*, 92; *Hill v. Holmes*, *Ibid.*, 96; *Cruger v. Armstrong*, 3 Johns. Cas., 5; *Conroy v. Warren*, *Ibid.*, 259; *Thurston v. McKown*, 6 Mass., 428; *Wheeler v. Guild*, 20 Pick., 545; *Aldrich v. Warren*,  
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delivery order does not of itself pass the property in the goods mentioned in it; it is therefore not a negotiable security within the rule above mentioned; and the transferee is accordingly bound to inquire into the title of the transferor.<sup>1</sup>

With regard to ordinary choses in possession, a valid title to them is generally obtained by a purchase in an open market, or *market overt*, although no property may have been possessed by the vendor.<sup>2</sup> And every shop in the city of London, where goods are openly sold, is considered as a market overt, within this rule, for such things as by the trade of the owner are put there for sale.<sup>3</sup> But the shops at the west end of the town do not appear to possess this privilege. If the sale is not made in market overt, the purchaser, though he purchase *bona fide*, acquires no further property in the article sold than was possessed by the vendor.<sup>4</sup> And, if a writ of execution should have been actually in the hands of the sheriff, on a judgment against the vendor at the time of the sale, the goods, if not sold in market overt, are subject, in the hands of the purchaser, to the sheriff's right to seize, in the same manner as if they had re-

16 Maine, 465; *Lapice v. Clifton*, 17 La., 152; *Munroe v. Cooper*, 5 Pick., 412; *Story on Bills*, 215; *Story on Promissory Notes*, 465, 469, 470; *Hoffman v. Foster & Co.*, 43 Penn. St., 137; *Paulette v. Brown*, 40 Miss., 52; *Benior v. Paquin*, 40 Vt., 199; *Turnbull v. Bouyer*, 2 Rob. (N. Y.), 406; *Winstead v. Davis*, 40 Miss., 785; *Lane v. Krekle*, 22 Iowa, 399; *Belmont Branch Bank v. Hoge*, 35 N. Y., 65. Where strong circumstances of fraud in the origin of the instrument have been shown, the holder should show that he gave value for it; *Smith v. Sac. County*, 11 Wallace (U. S.), 139. Not having paid a fair and reasonable price, is evidence of *mala fides*; *Baily v. Smith*, 14 Ohio St., 396; *De Witt v. Perkins*, 22 Wis., 473; although not conclusive; *Brown v. Penfield*, 36 N. Y., 473; but, in the absence of all proof, good faith and a consideration given will be presumed; *Lathrop v. Donaldson*, 22 Iowa, 234. The doctrine that possession carries with it the evidence of property, so as to protect a person acquiring it in the usual course of trade, is limited to cash, bank bills, and bills payable to bearer; *Saltus et al. v. Everett*, 20 Wend., 268; and the securities commonly called coupon bonds. See also, *County of Beaver v. Armstrong*, 44 Penn. St., 63; *Murray v. Lardner*, 2 Wallace (U. S.), 110; *Mercer County v. Hackett*, 1 *Ibid.*, 83; *Gelpecke v. City of Dubuque*, *Ibid.*, 175; *Meyer v. City of Muscatine*, *Ibid.*, 384; note 1, *ante* pp. 9 and 37.—G. & W.

<sup>1</sup> *Kingsford v. Merry*, 1 H. & N., 503.

<sup>2</sup> 2 Black. Com., 449. There are no markets overt in the United States: *Ventress v. Smith*, 10 Pet., 161, 176.

<sup>3</sup> *The Case of Market Overt*, 5 Rep., 83 b; *Lyons v. De Pass*, 11 Ad. & E., 326 (39 E. C. L.).

<sup>4</sup> *Peer v. Humphrey*, 2 Ad. & E., 495 (29 E. C. L.); *White v. Spettigue*, 13 M. & W., 603.

mained in the hands of the vendor.<sup>1</sup> So, if the goods have been stolen, a *bona fide* purchaser, who has not bought them in market overt, will be bound to restore them to the true owner;<sup>2</sup> whereas, a sale in market overt would have given the purchaser a valid title. There is one case, however, in which even a sale in market overt will not protect a purchaser, namely, the case of the goods having been stolen, and the true owner prosecuting the thief and obtaining his conviction. In this case the property in the goods, wherever they may be, vests, on the conviction, in the true owner.<sup>3</sup> If a person suffer the loss of his goods by theft, he cannot by any civil action recover them from the felon.<sup>4</sup> To do this, he is bound to suffer the further loss of time or money incurred in a prosecution. If he should succeed in obtaining a conviction, he is then rewarded for his good fortune by a restitution of his property, whether in the hands of the felon himself, or of any innocent purchaser who may have chanced to buy them, although in open market. Such is the application made by the law of the righteous principle of restitution.<sup>5</sup>

With regard to horses, a sale in market overt will not confer on the purchaser any further title than is possessed by the vendor, unless the sale be made according to the directions of certain statutes;<sup>6</sup> and even then the true owner may, at any time within six months after his horse has been stolen, recover his property on tender to the person in possession of the price he *bona fide* paid for it.<sup>7</sup>

A factor or agent in the possession of goods cannot by the common law give any further title to the goods than he was authorized to do by his principal, either expressly, or by implication arising from the usual course of his employment.<sup>8</sup> And, when one man is appointed the agent of another for any particular purpose by power of attorney, his authority must still be strictly pursued, otherwise his principal will not be bound.<sup>9</sup>

<sup>1</sup> Samuel v. Duke, 3 M. & W., 622. See *ante*, p. 98.

<sup>2</sup> White v. Spettigue, 13 M. & W., 603.

<sup>3</sup> Scattergood v. Sylvester, 15 Q. B., 506 (69 E. C. L.).

<sup>4</sup> Stone v. Marsh, 6 B. & C., 551, 561 (13 E. C. L.); 2 Wms. Saund., 47 b, n. (p.). But see Benj. on Sales, s. 11, 4th Am. ed.

<sup>5</sup> See Chowne v. Baylis, 31 Beav., 351.

<sup>6</sup> Stats. 2 & 3 P. & M., c. 7; 31 Eliz., c. 12; 2 Black. Com., 450.

<sup>7</sup> Stat. 31 Eliz., c. 12, s. 4.

<sup>8</sup> Pickering v. Busk, 15 East, 38, 43.

Attwood v. Munnings, 7 B. & C., 278 (14 E. C. L.).

The authority of an agent acting under a power of attorney is ordinarily determinable at the will of the principal, and is determined by the death of the principal. But to each of these rules there is an exception. Where the appointment, or letter of attorney, forms part of a contract, or is security for the performance of any act, or, in other words, where it is not gratuitous merely, but rests upon a consideration, it is usually made irrevocable in terms, or, if not so made, it is deemed irrevocable in law, except by the death of the principal; and, if it be a power coupled with an interest, *i.e.*, an interest not merely in the execution of the power, or in the proceeds, but in the thing which constitutes the subject-matter of the power, enabling the agent or attorney to act in his own name, even the death of the principal does not revoke it.<sup>1</sup> There are cases, however, in which an agency with a mere interest in the proceeds seems, without much consideration, to have been regarded as constituting a power coupled with an interest.<sup>2</sup> Where the power is not coupled with an interest, neither the estate of the principal nor the agent is bound by contracts made by the latter after the principal's death, but in ignorance of it.<sup>3</sup> Even a contract by one partner, after dissolution of the firm by the death of another partner, does not bind the other members, though the other party to the contract was ignorant of the death.<sup>4</sup> The letter of attorney may provide that the power shall be valid notwithstanding the death of the principal.<sup>5</sup>

In ancient times the sale of lands was usually accompanied by a warranty of their title; and some words, such as the word *give* in a feoffment, had the effect of an implied warranty when none was expressed.<sup>6</sup> When warranties fell into disuse, the purchasers of lands acquired a right to covenants for the title, varying in their

<sup>1</sup> *Hunt v. Rousmanier's Admr.*, 8 Wheat., 174; 2 Kent's Com., 646, n.

<sup>2</sup> *Wylie v. Coxe*, 15 How., 415; *Jeffries' Admr. v. Mut. Life Ins. Co.*, 110 U. S., 305, 310.

<sup>3</sup> *Blades v. Free*, 9 B. & C., 167 (17 E. C. L.); *Campanari v. Woodburn*, 15 C. B., 400 (80 E. C. L.); *Watson v. King*, 4 Camp., 274; *Lepard v. Vernon*, 2 V. & B., 51; *Galt v. Galloway*, 4 Pet., 332, 344; *Harper v. Little*, 2 Me., 14; *Davis v. Bank*, 46 Vt., 723; *Ferris v. Irving*, 28 Cal., 645; *Clayton v. Merritt*, 52 Miss., 353. But see *Cassiday v. McKenzie*, 4 Watts & S., 282.

<sup>4</sup> *Marlett v. Jackman*, 3 Allen, 287.      <sup>5</sup> *Kiddill v. Farnell*, 3 Sm. & G., 428.

<sup>6</sup> See *Williams' Real Property*, 344, 1st ed.; 346, 2d ed.; 359, 3d ed.; 365, 4th ed.; 376, 5th ed.; 399, 6th ed.; 407, 7th ed.; 426, 8th ed.; 6th Am. ed., 346. See "*Rawle on Covenants for Title*," p. 467, *et seq.*

stringency according to the nature of the title of the vendor.<sup>1</sup> No warranty, however, it was formerly held, rises from the mere sale of goods, unless it be expressly given, or implied from the custom of the trade or the nature of the contract;<sup>2</sup> but the sale of goods in an open shop or warehouse has lately been held to be an implied warranty that the seller is the owner of the goods.<sup>3</sup> Every affirmation made by the vendor at the time of sale respecting the goods is an express warranty, if it appear to have been so intended.<sup>4</sup> And, if the vendor state that the goods are his own, this amounts to a warranty of his title;<sup>5</sup> but, if the contract for sale be in writing, the warranty must be in writing also.<sup>6</sup> And a warranty made subsequently to the sale is void for want of consideration.<sup>7</sup> Contracts made in the course of any trade are always subject to the custom of that trade; and, if by the custom of the trade a warranty is implied in any contract, the vendor will be bound by it, in the same manner as if he had given an express warranty.<sup>8</sup> So the nature of the contract may be such as to imply a warranty. Thus, a contract to furnish goods for a particular purpose contains an implied warranty that they are fit for that purpose;<sup>9</sup> and a contract to furnish manufactured goods implies a warranty that they shall be of a merchantable quality.<sup>10</sup>

By all the authorities, it is agreed that, in an executory agreement to sell, the vendor warrants his title to the goods he is to deliver; that, in any sale of a chattel, an affirmation by the vendor

<sup>1</sup> *Ibid.*, 348, 1st ed.; 349, 2d ed.; 362, 3d ed.; 368, 4th ed.; 379, 5th ed.; 402, 6th ed.; 410, 7th ed.; 429, 8th ed.; 6th Am. ed., 351 *et seq.*

<sup>2</sup> *Chanter v. Hopkins*, 4 M. & W. 399; *Burnby v. Bollett*, 16 M. & W. 644; *Morley v. Attenborough*, 3 Exch. Rep., 500; *Bagueley v. Hawley*, Law Rep., 2 C. P., 625.

<sup>3</sup> *Eicholtz v. Bannister*, C. P., 11 Jur. N. S., 15; s. c., 17 C. B. N. S., 708 (112 E. C. L.).

<sup>4</sup> See *Richardson v. Brown*, 1 Bing., 344 (8 E. C. L.); *Sheppard v. Kain*, 5 B. & Ald., 240 (7 E. C. L.); *Power v. Barham*, 4 Ad. & E., 473 (31 E. C. L.); *Carter v. Crick*, 4 H. & N., 412.

<sup>5</sup> *Furniss v. Leicester*, Cro. Jac., 474; *Medina v. Stoughton*, 1 Salk., 210.

<sup>6</sup> *Pickering v. Dowson*, 4 Taunt., 779.

<sup>7</sup> *Finch*, L., 189. See *ante*, p. 115.

<sup>8</sup> *Jones v. Bowden*, 4 Taunt., 847.

<sup>9</sup> *Jones v. Bright*, 5 Bing., 533 (15 E. C. L.); *Brown v. Edgington*, 2 Man. & Gr., 279 (40 E. C. L.).

<sup>10</sup> *Laing v. Fidgeon*, 6 Taunt., 108 (1 E. C. L.).

that the property is his, is equivalent to a warranty of title; and that, though nothing be said, yet, if the vendor knew he had no title, and concealed that fact from the vendee, he is liable on the ground of fraud.<sup>1</sup> And the later view seems to be that the fact of selling is, in effect, a holding of one's self out as owner, equivalent to an affirmation of ownership, and, therefore, to an implied warranty of title, unless the facts and circumstances are such as to rebut that implication.<sup>2</sup> In America, the rule is well settled that there is such an implied warranty, if, at the time of the sale, the vendor is in possession of the chattels;<sup>3</sup> but, if they were then in possession of a third person, the rule *caveat emptor* applies.<sup>4</sup>

If goods and chattels should have come into the possession of persons having no title to them, such persons will, in course of time, be quieted in their enjoyment by virtue of the statute of limitations.<sup>5</sup> By this statute, all actions of trespass, detinue and replevin for goods or cattle must be brought within *six* years next after the cause of such action;<sup>6</sup> but, if the person entitled to any such action be under age, *feme covert*, *non compos mentis*, beyond seas, or imprisoned, such person shall be at liberty to bring the same action within *six* years after the disability is removed.<sup>7</sup>

When a cause of action accrues to a person in his lifetime, the time limited by the statutes of limitation will run on after his decease from the period that the cause of action accrued, and will not be reckoned from the time that administration was taken out to his effects.<sup>8</sup> But, if the cause of action accrue after the death of the party, the time limited by the statute will run only from the grant of the letters of administration.<sup>9</sup> On the other hand, the death of

<sup>1</sup> Benj. on Sales, book iv., part 2, c. 1, sec. 943, 4th Am. ed.

<sup>2</sup> *Ibid.*, s. 961; Eickholz v. Bannister, 17 C. B. N. S., 708 (112 E. C. L.).

<sup>3</sup> *Ibid.*, s. 962, citing Bennett v. Bartlett, 6 Cush., 225; Vibbard v. Johnson, 19 Johns., 78; Case v. Hall, 24 Wend., 102; Don v. Fisher, 1 Cush., 273. See, also, 2 Kent Com., 478; Bishop on Contracts, s. 243, and citations.

<sup>4</sup> Lackey v. Stonder, 2 Ind., 376; Huntingdon v. Hall, 36 Me., 501; s. c., 58 Am. Dec., 765; Scranton v. Clark, 39 N. Y., 220; Scott v. Hix, 2 Sneed, 192; s. c., with note discussing warranty of title, 62 Am. Dec., 458; Long v. Hickinbottom, 28 Miss., 772; s. c., 64 Am. Dec., 118; cited in Bishop on Contracts, s. 243.

<sup>5</sup> Stat. 21 Jac. I., c. 16.

<sup>6</sup> Sect. 3.

<sup>7</sup> Sect. 7.

<sup>8</sup> 2 Wms. Saund., 63 k.

<sup>9</sup> Murray v. East India Company, 5 B. & Ald., 204 (7 E. C. L.); Perry v. Jenkins, 1 Myl. & Cr., 118.

the debtor, and the absence of any personal representative to his effects, will not prevent the time limited by the statute from continuing to run on. For, if there be once a cause of action, a plaintiff that can sue, and a defendant that can be sued in England, the time limited by the statute will begin to run, and will not be stopped by the decease of either party.<sup>1</sup> An executor or administrator is not, however, bound to plead the statute of limitations to any debt or demand, but may, if he please, pay the same notwithstanding the time limited by the statute may have expired.<sup>2</sup> But, if the

<sup>1</sup> *Rhodes v. Smethurst*, 6 M. & W., 351; *Freake v. Cranesfeldt*, 3 Myl. & Cr., 499; *Sturgis v. Darrell*, 6 H. & N., 120.

<sup>2</sup> *Norton v. Frecher*, 1 Atk., 526; *Ex parte Dowdney*, 15 Ves., 493. See *Stahlschmidt v. Lett*, 1 Sm. & G., 415.

An executor or administrator is not bound to interpose the general Statute of Limitations, in bar of the recovery of a demand against the estate, which is otherwise well founded: *Hodgon, Admr., v. White et al.*, 11 N. H., 108; *Leigh, Admr., v. Smith et al.*, 3 Ired. Eq., 442; *Walter v. Radcliffe, Admr. et al.*, 2 Desauss., 577; *Kennedy's Ap.*, 4 Penn. St., 149; *Brown et al., Admrs., v. Porter*, 7 Humph., 373; *Barnawell v. Smith*, 5 Jones Eq., 168; nor can the legatees or creditors of the decedent require them to do so: In the matter of *Smith*, 1 Ash., 352; *Leigh, Admr., v. Smith et al.*, 3 Ired. Eq., 442; but they may themselves intervene and plead the statute: *Campbell v. Fleming*, 63 Penn. St., 242; but the court will not allow a sale of the real estate of the testator or intestate for the purpose of paying a debt barred by the statute: *The Heirs of Bond v. Smith, Admr.*, 2 Ala., 660. Where, however, for the more speedy settlement of the estates of decedents, statutes have been passed, enacting that all claims, not presented within a certain time after his death, shall be barred, it is the duty of the executor or administrator to plead the statute: *Hodgon, Admr., v. White et al.*, 11 N. H., 208; *Brown v. Anderson*, 13 Mass., 301; *Thompson v. Brown*, 16 *Ibid.*, 172; *Emerson v. Thompson, Ibid.*, 429; *Heath v. Wells*, 5 Pick., 140; *Tunstall et al. v. Pollard's Admr.*, 11 Leigh, 2; *Brown et al., Admrs., v. Porter*, 7 Humph., 373.

A debt is not revived by the promise of an administrator to pay it: *McCann v. Sloan*, 25 Md., 575; *Campbell v. Fleming*, 63 Penn. St., 242.

Whether one administrator may charge the estate, by refusing to plead the Statute of Limitations, although his co-administrator insist on pleading it, is doubted; but, if one of the administrators stand neutral, the other may plead the statute: *Scull et al., Admrs., v. Exrs. of Wallace*, 15 S. & R., 231.

In the case of *Smith v. Porter et al., Exrs.*, 1 Binn., 299, Chief Justice Tilghman, in deciding that a debt, which is barred by the act of limitations, is not revived by a clause in a will, ordering all the testator's just debts to be paid, says: "Whether the debts are just or not, must be left to the judgment of the executor, before he makes a voluntary payment; and if, upon a candid examination, he thinks a debt not justly due, it would be doing violence to the words of the testator so to construe them as to deprive the executor of the legal means of defence, by pleading the act of limitations. But an executor ought not to plead that act

estate be administered in the court of chancery, any party to the suit is competent to take the objection, although the executor may not have insisted on it.<sup>1</sup>

Notwithstanding the period of six years limited for the payment of simple contract debts, the debtor may, by charging his real estate by his will with the payment of his debts, and, *a fortiori*, by creating an express trust for their payment out of his real estate, prevent the operation of the statute on all such debts as have not been barred by the statute in his lifetime.<sup>2</sup> Real estate, it will be remembered, was not formerly liable to the payment of any debts which were not secured by specialty binding the heirs;<sup>3</sup> and the alteration, which in this respect has been made in the law, affects only such real estates as have not been charged by the deceased with the payment of his debts. The creditors, therefore, in whose favor the charge is made, acquire, as before the alteration, the character of *cestui que trusts*; and in equity they will not be allowed to lose their debts, because they do not go to law to enforce payment when they have a trustee to pay them.<sup>4</sup> But after twenty years the charge, if not enforced, will be barred like any other charge.<sup>5</sup> An express trust, however, is proof against any length of time.<sup>6</sup> But, as personal estate has always been primarily liable to the payment of all debts, a trust created by a testator for the payment of his debts out of his personal estate will not prevent the operation of the statute.<sup>7</sup>

When a chose in action, whether legal or equitable, is transferred from one person to another, notice of the assignment should be

against a just debt; on the contrary, if he knows it to be just, I think it is as dishonest in him to use that plea as it would be in the case of his own debt." But since the decision of Lewis, J., in *Kittera's Estate*, 17 Penn. St., 423, prudence would suggest to an administrator or executor the propriety of pleading the statute whenever applicable.—G. & W.

<sup>1</sup> *Shewen v. Vanderhorst*, 1 Russ. & My., 347; s. c. 2 Russ. & My., 75.

<sup>2</sup> *Burke v. Jones*, 2 Ves. & B., 275; *Hughes v. Wynne*, Turn. & Russ., 307; *Crallan v. Oulton*, 3 Beav., 1.

<sup>3</sup> See *Williams' Real Property*, 57, 1st ed.; 51, 2d ed.; 64, 3d and 4th eds.; 68, 5th ed.; 72, 6th ed.; 74, 7th ed.; 75, 8th ed.; 6th Am. ed., 63-64; *ante*, p. 145-146.

<sup>4</sup> Turn. & Russ., 309.

<sup>5</sup> *Dundas v. Blake*, 11 Ir. Eq. Rep., 138; *Sug. Real Prop. Stat.*, 107; *Jacquet v. Jacquet*, 27 Beav., 322; *Dickinson v. Teesdale*, 31 Beav., 511.

<sup>6</sup> See *Williams on Assets*, p. 40.

<sup>7</sup> *Scott v. Jones*, 4 Cl. & Fin., 382; *Freaker v. Cranefeldt*, 3 Myl. & Cr., 499.

given by the transferee to the person liable to the action at law or suit in equity, the right to bring which is the subject of the transfer.<sup>1</sup> Thus, if a debt be assigned, notice of assignment should be given to the debtor. If the subject of the assignment be the right to stock standing in the name of a trustee, notice of assignment should be given to such trustee. Until such notice be given, it is evident that the debtor may innocently pay the debt, or the trustee transfer the stock to the transferor; or the transferor may fraudulently transfer his right over again to a third person. The transferee, therefore, until he has given notice to the party liable, has not done all that lies in his power to perfect his title. The chose in action still remains the apparent property of the transferor. The importance of giving notice suggests the precaution that every person about to accept an assignment of a chose in action should inquire of the person liable to the action or suit whether he has had notice of any prior assignment. And, if there be two or more persons liable, inquiry should be made of every one of them, for notice by a prior assignee to any one of them would be equivalent to notice to all.<sup>2</sup> The inquiry, however, thus recommended will not, of itself, strengthen the title of the assignee further than by assuring him that no previous assignment has been made. In order to obtain a good title, he must himself give notice to the person or one of the persons liable to the debt or demand assigned to him. When this has been done, his title will be secure, and will prevail over that of any unknown prior assignee who may have omitted to give such notice.<sup>3</sup> If the property consist of money or stock standing in the name of the accountant-general of the court of chancery, or of securities in his possession,<sup>4</sup> an order of the court should be obtained restraining transfer or payment without notice to the assignee. This order is called a stop order, and will have the same effect as notice of assignment given to any private debtor.<sup>5</sup> If the property be stock standing in the name of a trustee, who has died

<sup>1</sup> *Dearle v. Hall*, *Loveridge v. Cooper*, 3 Russ., 1; *Bright's Trusts*, 21 Beav., 430.

<sup>2</sup> *Smith v. Smith*, 2 Cr. & M., 231; *Meux v. Bell*, 1 Hare, 73, 87. See *Browne v. Savage*, 4 Drew., 635, 640.

<sup>3</sup> *Dearle v. Hall*, *Loveridge v. Cooper*, 1 Russ., 1.

<sup>4</sup> *Williams v. Symonds*, 9 Beav., 523.

<sup>5</sup> *Greening v. Beckford*, 5 Sim., 195; *Swayne v. Swayne*, 11 Beav., 463.



without any administration having been taken out to his effects, a *distringas*, obtained by the assignee to restrain the transfer of the stock, will confer on him the same priority as notice to the trustee would have done had he been living.<sup>1</sup> When the property consists of a policy of assurance, or of shares in a joint-stock company, notice of the transfer should be given to the office of the company.<sup>2</sup>

The title to personal property sometimes depends upon deeds, wills or other documents of title of the like nature, and cannot be shown without their production. Thus, a reversionary interest in money in the funds, settled by deed or will, may be mortgaged and sold again and again before it becomes an interest in possession. In these cases the purchaser is entitled to an abstract of the deeds, wills, etc., which compose the title, in the same manner as if the subject of the contract had been real estate; and the original deeds, and the probates or office copies of the wills, must also, in like manner, be produced for the verification of the abstract.<sup>3</sup> The purchaser is also entitled either to the possession of the deeds, or, if this cannot be had, to attested copies of them, and a covenant for their production, at the expense of the vendor.<sup>4</sup> And, when an assignment of any kind of personal property is made by deed, it is usual for the assignor to enter into covenants for the title similar to those entered into, under the like circumstances, by the grantor of real estate.<sup>5</sup>

The vendor of shares in a joint-stock company is bound merely to give such evidence of the constitution of the company as to show that the proposed transfer will give a valid title to the shares sold.<sup>6</sup>

<sup>1</sup> *Etty v. Bridges*, 2 You. & Col., V. C., 466.

<sup>2</sup> *Williams v. Thorpe*, 2 Sim., 257; *Thompson v. Spiers*, 13 Sim., 469; *West v. Reid*, 2 Hare, 249; *Martin v. Sedgwick*, 9 Beav., 333; *Powles v. Page*, 3 C. B., 16 (54 E. C. L.).

<sup>3</sup> See *Williams' Real Property*, 349, 1st ed.; 351, 2d ed.; 364, 3d ed.; 370, 4th ed.; 381, 5th ed.; 404, 6th ed.; 412, 7th ed.; 431, 8th ed.; 6th Am. ed., 354; *Hobson v. Bell*, 2 Beav., 17.

<sup>4</sup> *Ibid.*, 354, 356, 1st ed.; 356, 358, 2d ed.; 369, 372, 3d ed.; 375, 378, 4th ed.; 389, 5th ed.; 412, 6th ed.; 420, 7th ed.; 440, 8th ed.; 6th Am. ed., 360.

<sup>5</sup> See *Williams' Real Property*, 348, 1st ed.; 349, 2d ed.; 362, 3d ed.; 368, 4th ed.; 379, 5th ed.; 402, 6th ed.; 410, 7th ed.; 6th Am. ed., 352-353.

<sup>6</sup> *Curling v. Flight*, 2 Phil., 6.3.

An assignment by A. to himself and B. of leasehold property or choses in possession vests the whole of the property in B.

From what has been said it will appear that the title to personal property is far more simple than that to real estate. And amongst the plans which have appeared for the amendment of the law has been one for adapting the machinery of the funds to the transfer of landed property. Upon consideration, however, it will perhaps appear that the greater complexity of the title to lands arises partly from the nature of the property, and partly from the more full power of disposition to which lands are subject. Lands, unlike stock, may be converted from arable to pasture; may be cut up into roads, canals or railways; may be sold by the foot for building purposes; may be let upon lease for terms absolute or determinable; may be held for life, or in tail, as well as in fee; and may be disposed of by contingent remainders, shifting uses and executory devises, without the intervention of any trustees. Personal property, on the contrary, cannot be settled without the intervention of trustees, in whom a great degree of personal confidence must necessarily be placed; but, when so settled, the title to it is sometimes as long and intricate as that to real estate. If the nature of lands could be altered, or if landowners were willing, in order to save themselves expense, to give up some of their powers of disposition, the title to real estate might doubtless be rendered as simple as that to personal property. To the latter alternative, however, few, if any, would be inclined to submit. Whilst, therefore, much might be done to simplify and improve our laws of property by an assimilation of the rules of real and personal estate, where the history of each forms the only ground of variety, care should be taken to preserve untouched such distinctions as are founded on the broad basis of practical difference.



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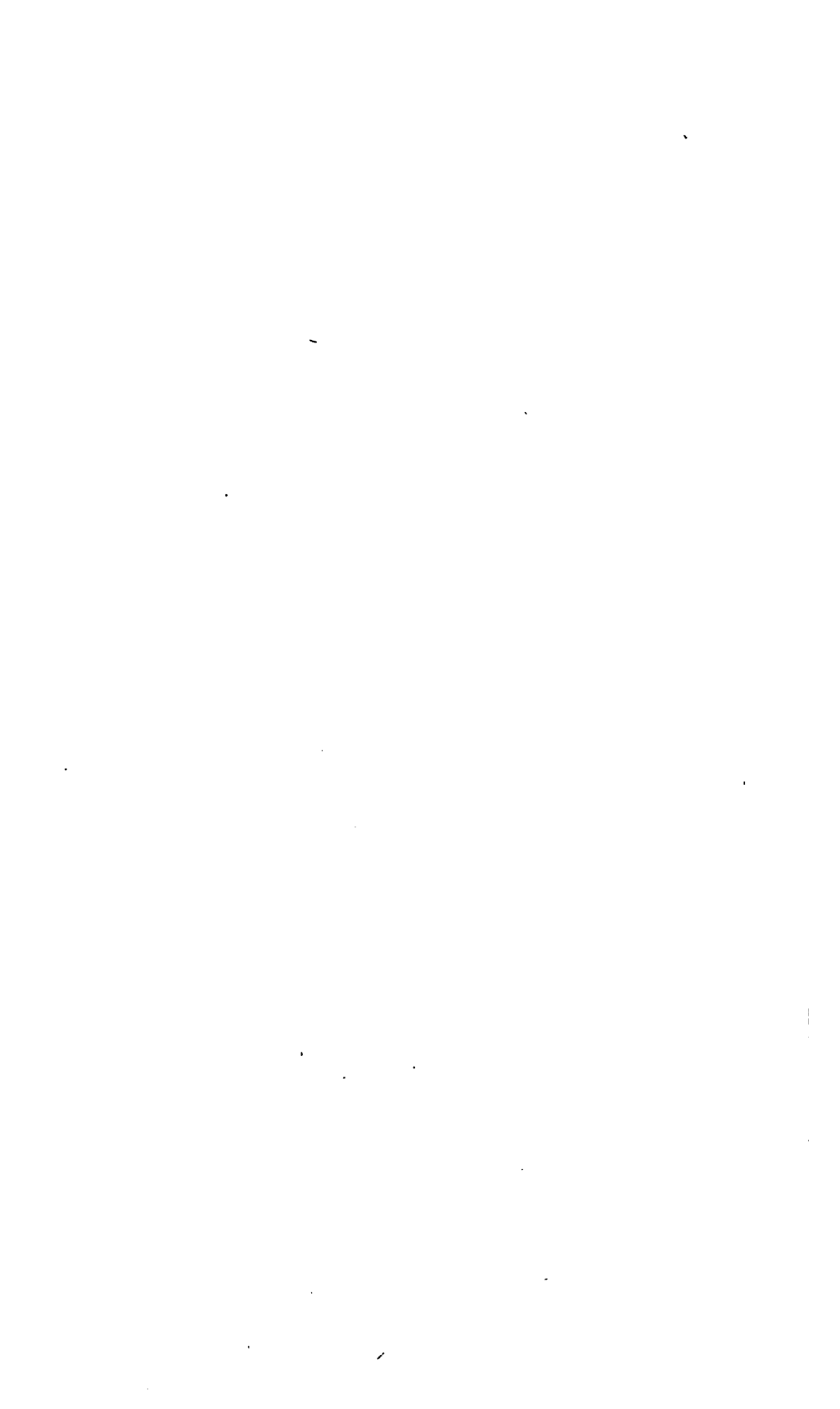
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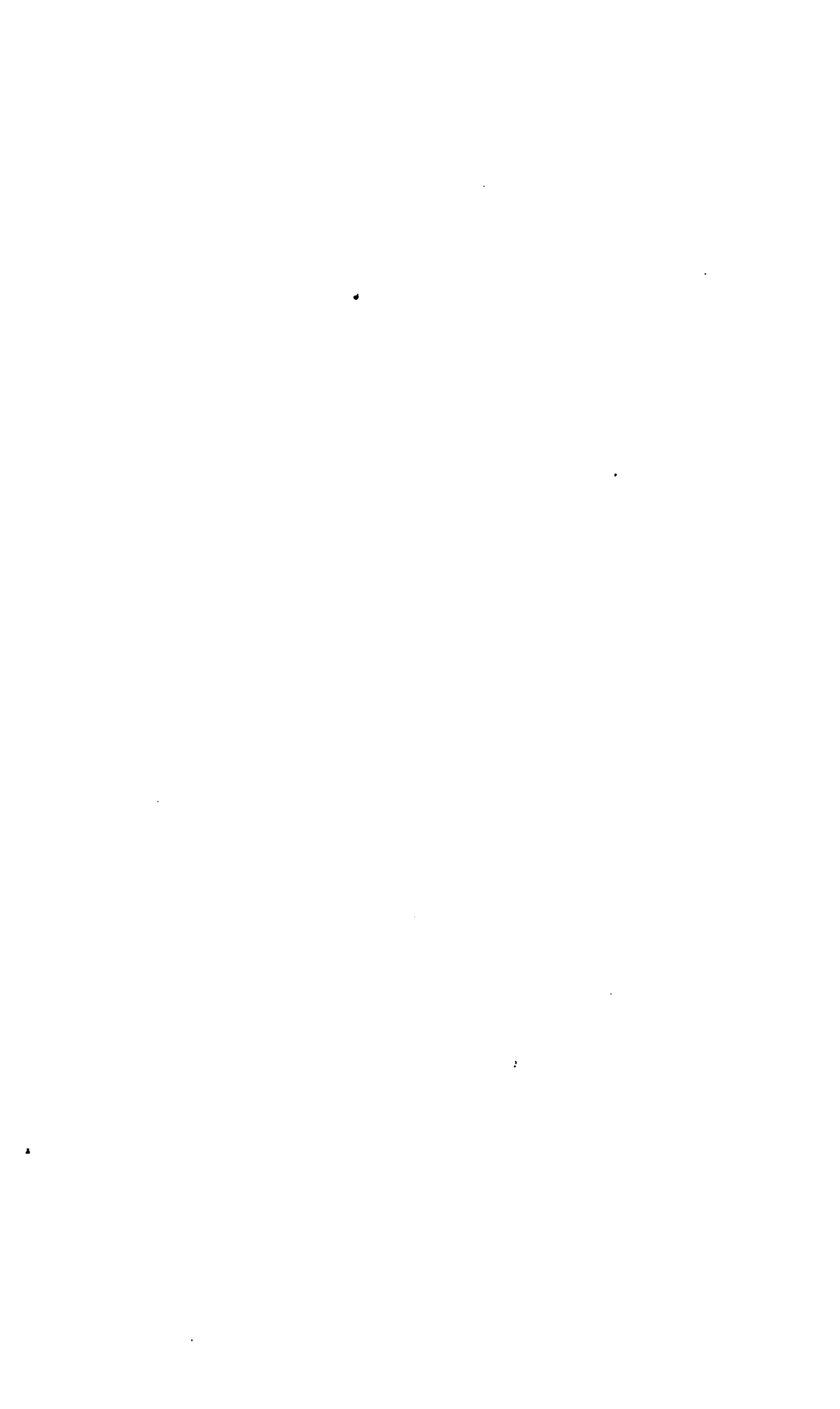
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